FILE COPY.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

Office Supreme Court, U.
FILED.
OCT 26 1906
JAMES H. McKENNE
CL

No. 49

THE STATE OF NEW JERSEY,
Appellant,

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt,
Appellee.

Appeal from and Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

HORACE KENT TENNEY,
FREDERICK D. SILBER,
Counsel for Appellee.

Geo. Hornstein Co., Printer, Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 49

THE STATE OF NEW JERSEY,
Appellant,

vs.

WILLIAM F. ANDERSON, Trustee of Cosmopolitan Power Company, Bankrupt,
Appellee.

Appeal from and Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

The Cosmopolitan Power Company was a New Jersey manufacturing corporation and originally incorporated with $40,000,000 of authorized capital stock. On May 13, 1902, the capital stock was reduced in accordance with the laws of New Jersey to $2,500,000.

On January 1, 1902, $10,000,000 of capital stock was issued and outstanding.

The corporation was adjudicated a bankrupt by

the United States District Court for the Northern District of Illinois, on a petition filed April 23, 1903. Thereafter, in the bankruptcy proceedings, on December 22, 1903, the State of New Jersey filed its claim as a creditor against the bankrupt corporation for $9,254.09, based upon license fees or franchise taxes, under Chapter 159 of the Laws of 1884. This claim was made up as follows:

For the taxes of 1902	$5,750.00
Interest thereon, to Oct. 15, 1903, at 1% monthly	891.25
Court costs, laid out on injunction proceedings against the corporation, because of non-payment of the taxes	26.15
Taxes for 1903	2,500.00
Interest to Oct. 15, 1903	87.50
Total	$9,254.90

The claim was filed in the form prescribed for an ordinary proof of debt (Rec., p. 12), alleging that the state held no note or judgment.

On February 12, 1904, the claimant State, filed its motion before the Referee in said bankruptcy proceedings, referring to said proof of claim, praying for an order upon the Trustee, to pay all of said claim in advance of the payment of dividends to creditors, as taxes legally due and owing by the bankrupt. The Trustee filed objections to the claim, and opposed the motion and upon a hearing of all of said matters before the Referee, an order was entered, denying all claim to priority, finding that the claim was not a tax, reducing the claim for the year 1902 to the sum of $4,250, and disallowing entirely the claim for 1903, making a total allowance

of $4,943.08, as a general claim. It appeared from the stipulation of facts entered into by the parties, before the Referee, that the bankrupt corporation made no return to the Board of Assessors for the year 1902, as required by the New Jersey statutes (Rec., p. 13), and that in pursuance of law, the assessors, *on November 7, 1902,* levied and reported to the state comptroller an assessment of *$5,750,* not upon the actual outstanding capital stock, but upon an amount ascertained by the Board in such manner as was deemed most practicable. It further appears that said sum of $5,750 would have been the amount properly levied upon a total capital stock of *$40,000,000* (Rec., p. 15), and that the actual amount then issued and outstanding was *$10,000,000.* Moreover, it appeared that said corporation filed the return required by law for 1903, upon $2,500,000 capital stock outstanding, and that an assessment of $2,500 was made on June 1, 1903, by said Board of Assessors. (Rec., pp. 15 & 16.)

The corporation was organized in April, 1900 (Rec., p. 22), with its principal office in Jersey City, New Jersey, *and never had any property within the State of New Jersey,* but did all of its business from its office in Chicago, Illinois.

A certificate of review from the order of said Referee having been prayed by appellant, the District Court made an order thereon, confirming and approving the order of the Referee. Upon a further appeal to the United States Circuit Court of Appeals for the Seventh Circuit, a decree was entered affirming the order of the District Court in all respects excepting that the claim for 1903, amounting

to $2,500, was ordered allowed as a general claim, with a certain rebate of interest. (Rec., p. 42.) Appellant obtained a certificate from Mr. Justice Day, permitting a further appeal to this court on May 11, 1905.

Thereafter appellee made a motion to dismiss said appeal for want of jurisdiction, which motion was denied by this court, and subsequently, upon a petition for a writ of *certiorari* to enable appellee to assign error from that much of the decree of the Circuit Court of Appeals which ordered the allowance of the claim for 1903 as a general claim, such petition was granted, a writ issued, and an order was made that the record on file stand as a return to said writ.

BRIEF OF POINTS AND AUTHORITIES.

I.

The Claim is not Entitled to any Priority.

a

The proper construction of Section 64 A, of the Bankruptcy Act of 1898, requires that only such taxes be paid as priorities as could be collected from property within the juridictional limits of the taxing body at the time the petition was filed. Said section does not provide for the payment of taxes due *all* states, counties, etc., but due *the* state, *the* county, etc.

Both the language of the section and the history of the legislation plainly shows that such intention was in the mind of Congress.

b

The license fee or "franchise tax" in question is not a tax, according to the decisions of the courts of New Jersey, and other courts.

in re U. S. Car Co., 60 N. J. Eq., 514.

In re Ott, 2 A. B. R., 637.

In re Danville Rolling Mill Co., 10 A. B. R., 327.

In re Aultman, Miller & Co., 12 A. B. R., 12.

North Jersey Street Ry. Co. v. *Mayor of Jersey City, etc.*, 63 Atl. Rep., 83.

Cooley on Taxation, vol. 1, pp. 6 and 7.

Singer Mfg. Co. v. *Heppenheimer*, 58 N. J. Law, 634.

Hancock v. *Singer Mfg. Co.*, 62 N. J. Law, 289.

Lumberville Bridge Co. v. *Assessors*, 55 N. J. Law, 537.

American Smelting & Refining Co. v. *People*, 82 Pac. Rep., 531.

c

The license fee for 1902 never became a valid charge, because the Board of Assessors had no right under the statute to levy it *in November*. The statute requiring the levy *in June is mandatory* and not directory. The court will not give priority to an allowance that never should have been made.

II.

Regardless of any priority, the reduction of the claim for 1902 was proper.

The District Court had the right to investigate the legality and amount of the tax for 1902, and to reduce it, under section 64 A, and the Board of

Assessors had no power to make the charge on any capital stock *not issued and outstanding.*

Trenton Heat & Power Co. v. *State Board of Assessors,* 63 Atl. Rep., 1005.

Arimex Copper Co. v. *State Board,* 69 N. J. L., 121.

Peoples Investment Co. v. *Assessors,* 37 Vroom, 175.

III.

On Certiorari.

The claim for 1903 should be disallowed, because said claim was not in existence and did not constitute a debt, at the time the bankruptcy petition was filed, and was not then "a tax legally due and owing."

Re Aultman, Miller & Co., 12 A. B. R., 12.

Emmerman v. *Ohio Steel & Iron Co.,* 13 A. B. R., 40.

Forms of the U. S. Supreme Court in Bankruptcy, Nos. 31 to 36.

Assignment of Error upon Certiorari.

The court having granted a writ of certiorari and having ordered the record on file to stand as a return to the writ, it will, in our judgment, simplify the argument to treat the assignment of error upon the writ of certiorari as cross-error and to argue it as part of appellee's argument.

Appellee assigns error upon that much of the decree of the United States Circuit Court of Appeals for the Seventh Circuit, which reversed the decree of the District Court, and which ordered the license fee for 1903 to be allowed in the sum of $2,500, less a rebate of interest at one per cent a month, from

July 1, 1903, back to April 23, 1903, as a general claim against the bankrupt.

ASSIGNMENT OF ERROR BY APPELLEE UPON CERTIORARI.

Comes now William F. Anderson, trustee of Cosmopolitan Power Company, bankrupt, by Horace Kent Tenney and Frederick D. Silber, his attorneys, and files herein the following assignments of error, upon which he will rely to reverse that much of the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said cause of State of New Jersey v. William F. Anderson, trustee of Cosmopolitan Power Company, bankrupt, being a certain judgment entered therein on April 11, 1905, whereby said court directed that so much of the judgment and decree of the District Court of the United States, for the Northern District of Illinois, entered on September 12, 1904, in the matter of the Cosmopolitan Power Company, bankrupt, be reversed and that said District Court be ordered to add to its allowance of a general claim, the sum of $2,500, less a rebate of interest at one per cent per month from July 1, 1903, back to April 23, 1903.

1. For that said United States Circuit Court of Appeals for the Seventh Circuit erred in holding that said State of New Jersey was entitled to the allowance of any claim for license fees or franchise taxes for the year 1903, against said bankrupt.

2. For that the said United States Circuit Court of Appeals for the Seventh Circuit erred in holding that upon the day of the filing of the bankruptcy petition against the Cosmopolitan Power Company, bankrupt, said State of New Jersey had a provable claim against said bankrupt, or was entitled to any

allowance for license fees or franchise taxes for the year 1903, against said bankrupt.

3. For that said United States Circuit Court of Appeals for the Seventh Circuit erred in reversing any part or portion of the judgment of the District Court of September 12, 1904, and in taxing any costs against the appellee in said court.

Wherefore in order that the foregoing assignment of error may be and appear of record, the said William F. Anderson, as trustee aforesaid, presents the same to the court and prays that such disposition be made thereof, in accordance with law and the statutes of the United States in such case made and provided, and that so much of said judgment of said United States Circuit Court of Appeals, as reverses any part of the judgment of the District Court for the Northern District of Illinois, of September 12, 1904, may be reversed and said order and judgment of the District Court be ordered affirmed in all respects.

HORACE KENT TENNEY,
FREDERICK D. SILBER,
Attorneys for Said Appellee,
William F. Anderson, as Trustee.

ARGUMENT.

I.

The claim of the State of New Jersey is not a tax, and cannot be allowed any preference over the other creditors of the bankrupt.

Counsel for appellee expected to argue this case orally.

Ever since the record was filed, almost a year and a half ago, we have been in communication with the clerk of this court, so that we might be exactly informed when the case would be reached for argument. We received appellant's brief on October 18th, and on October 19th the case appeared upon the call for the first time, and was reached and argued by appellant. We had been informed that there was no likelihood that it would be reached before the week of October 22nd, and hence were taken by surprise, and prevented from appearing in time to make our argument.

Thus, unfortunately, we were deprived of an opportunity to present our side of the case orally to the court. This we regret all the more, because the questions involved are of great interest and importance to the administration of the Bankruptcy Act, and we are advised that many similar cases have been awaiting the decision of this case.

Before a court of bankruptcy is justified in allowing a claim as a tax, it must appear clearly that it is in reality a tax. The court would not accord such an unusual privilege as priority to a claim whose status as a tax was doubtful, nor would the

court indulge in any presumptions as to the nature of the claim in favor of its being a tax. The allowance of priority is at the expense of the general creditors, and in a case like that at bar, where almost the entire estate will be absorbed if the claim of New Jersey for $9,254.90 should be allowed and paid in full, it behooves the court to be clearly satisfied that the claimant is entitled to the special favor of priority.

The Referee, the District Court and the Circuit Court of Appeals, have each in turn found that the exaction in question *was not a tax.* They have all agreed that the claim in question was based upon a contract to pay to the state such sum in annual instalments, as it required from the corporation for the mere privilege of existing, for the franchise *to be.*

The mere reading of the opinion of the Referee (Rec., pp. 3 to 8), and of the Circuit Court of Appeals (Rec., pp. 36 to 41), gives cogent reason for arriving at such a conclusion and we submit that this court would not disturb the judgment of the courts below, unless it clearly and convincingly appeared that the claim was an actual tax and not one merely called by that name.

The claim arises under the statutes of the State of New Jersey, being Chapter 189, of the Public Laws of 1884, entitled, "An Act to Provide for the Imposition of State Taxes Upon Certain Corporations, and for the Collection Thereof."

These statutes in substance provide that all corporations organized under the laws of New Jersey shall pay an annual *license fee* or franchise tax

of 1/10 of one per cent on all amounts of capital stock issued and outstanding, up to and including the sum of $3,000,000, etc. Other sections of the act provide for the ascertainment of the amount either by return of the corporation or by the State Board of Assessors, upon information and belief, provide for a report by the State Board of Assessors to the comptroller on or before the first Monday in June of each year, as to the amounts of such license fee or franchise tax, provide for interest being charged after July 1st of each year, provide that *such tax, when determined, shall be a debt due from the corporation to the state for which an action at law may be maintained* and a preferred debt in case of insolvency, provide for the issuing of an injunction to restrain the corporation from the exercise of its franchise after the debt shall have been in arrears for three months, and for other remedies to the state by forfeiture of the charter.

We set out the appropriate sections in full, using the section numbers adopted in Dill's New Jersey Corporations, (1902).

> "150. STATE TAXATION OF BUSINESS CORPORATIONS; REPORT TO STATE BOARD OF ASSESSORS.
>
> "All corporations incorporated under the laws of this state, other than those which are subject to the payment of a state franchise tax assessed upon the basis of gross receipts, shall make ANNUAL RETURN to the state board of assessors on or before the FIRST TUESDAY OF MAY in each year, and shall state therein the amount of the capitalSTOCK OF SUCH CORPORATION ISSUED AND OUTSTANDING ON THE FIRST DAY OF JANUARY preceding the making of said return, together with

such other information as may be required by said board to carry out the provisions of this act, and shall pay *an annual license fee or franchise tax* of one-tenth of one per centum on all amounts of capital stock issued and outstanding up to and including the sum of three million dollars; on all sums of capital stock issued and outstanding in excess of three million dollars and not exceeding five million dollars, *an annual license fee* or franchise tax of one-twentieth of one per centum, and the further sum of fifty dollars per annum per one million dollars, or any part thereof, on all amounts of capital stock issued and outstanding in excess of five million dollars; *provided,* that this act shall not apply to railway, canal or banking corporations, or to savings banks, cemeteries or religious corporations, or purely charitable or purely educational associations not conducted for profit, or manufacturing or mining corporations at least fifty per centum of whose capital stock issued and outstanding is invested in mining or manufacturing carried on within this state, and which mining or manufacturing corporations shall have stated in the annual return to the state board of assessors where the mine or manufacturing establishment of such corporation or corporations is or are located, the character of the ores mined or the goods manufactured, the total amount of its capital stock embarked in the business of mining or manufacturing and the amount of capital stock actually employed in New Jersey in carrying on such mining or manufacturing business; if any manufacturing or mining company carrying on business in this state shall have less than fifty per centum of its capital stock, issued and outstanding, invested in business carried on within this state, such money shall pay *the annual license fee* or franchise tax herein provided for companies not carrying on business in this state, but shall be entitled, in the computation of such

tax, to a deduction from the amount of its capital stock issued and outstanding of the assessed value of its real and personal estate so used in manufacturing or mining."

"151. PENALTIES FOR FALSE STATEMENT, OR FAILURE TO MAKE STATEMENT.

"If any officer of any company required by this act to make a return, shall, in such return, make a false statement, he shall be deemed guilty of perjury; if any such company shall neglect or refuse to make such return within the time limited as aforesaid, the state board of assessors shall ascertain and fix the amount of the *annual license fee* or franchise tax, and the basis upon which the same is determined, *in such manner as may be deemed by them most practicable,* and the amount fixed by them shall stand as such basis of taxation under this act."

"152. DUTIES AND POWERS OF STATE BOARD OF ASSESSORS.

"The state board of assessors shall certify and report to the comptroller of the state, on or before the first Monday of June in each year, a statement of the basis of the *annual license fee* or franchise tax as returned by each company to, or ascertained by, the said board, and the amount of tax due thereon respectively, at the rates fixed by this act; such tax shall thereupon become due and payable, and it shall be the duty of the state treasurer to receive the same; IF THE TAX OF ANY COMPANY REMAINS UNPAID ON THE FIRST DAY OF JULY, after the same becomes due, the same shall thenceforth bear INTEREST AT THE RATE OF ONE PER CENTUM FOR EACH MONTH until paid; THE STATE BOARD OF ASSESSORS SHALL HAVE POWER TO REQUIRE OF ANY CORPORATION SUBJECT TO TAX UNDER THIS ACT SUCH INFORMATION OR REPORTS TOUCHING THE AFFAIRS OF SUCH COMPANY AS MAY BE NECESSARY TO CARRY OUT THE PROVISIONS OF THIS ACT; and may require the production of the books of such company, and may swear and examine witnesses in relation

thereto; the comptroller shall receive as compensation for his services under this act and under the act entitled 'An act for the taxation of railroad and canal property,' approved April tenth, one thousand eight hundred and eighty-four, the sum of five hundred dollars annually."

"153. TAX IS A DEBT; HOW COLLECTED; PREFERRED IN CASE OF INSOLVENCY.

"Such tax, when determined, *shall be a debt* due from such company to the State, for which *an action at law* may be maintained after the same shall have been in arrears for the period of one month; such tax shall also be a preferred debt in case of insolvency."

"154. INJUNCTION AGAINST COMPANY IN ARREARS FOR THREE MONTHS.

"In addition to other remedies for the collection of such tax it shall be lawful for the attorney-general, either of his own motion or upon request of the state comptroller, whenever any tax due under this act from any company shall have remained in arrears for a period of three months after the same shall have become payable, to apply to the court of chancery, by petition in the name of the state, on five days' notice to such corporation, which notice may be served in such manner as the chancellor may direct, for an injunction to restrain such corporation from the exercise of any franchise, or the transaction of any business within this state until the payment of such tax and interest due thereon, and the costs of such application, to be fixed by the chancellor; the said court is hereby authorized to grant such injunction, if a proper case appears, and upon the granting and service of such injunction, it shall not be lawful for such company thereafter to exercise any franchise or transact any business in this state until such injunction be dissolved."

"155. FOR FAILURE FOR TWO YEARS TO PAY STATE TAX CHARTER VOID, UNLESS GOVERNOR GIVES FURTHER TIME.

"If any corporation heretofore or hereafter created shall for two consecutive years neglect or refuse to pay the State any tax which has been or shall be assessed against it under any law of this state and made payable into the state treasury, the charter of such corporation shall be void, and all powers conferred by law upon such corporation are hereby declared inoperative and void, unless the governor shall for good cause shown to him, give further time for the payment of such taxes, in which case a certificate thereof shall be filed by the governor in the office of the comptroller, stating the reasons therefor."

"159. ATTORNEY-GENERAL MAY PROCEED AGAINST CORPORATIONS IN ARREARS; RECEIVER MAY BE APPOINTED.

"After any corporation of this state has failed and neglected for the space of two consecutive years to pay the taxes imposed on it by law, and the comptroller of this state shall have reported such corporation to the governor of this state, as provided in said amendatory act, then it shall be lawful for the attorney-general of this state to proceed against said corporation in the court of chancery of this state for the appointment of a receiver, or otherwise, and the said court in such proceeding shall ascertain the amount of the taxes remaining due and unpaid by such corporation to the state of New Jersey, and shall enter a final decree for the amount so ascertained, and thereupon a *fieri facias* or other process shall issue for the collection of the same as other debts are collected, and if no property which may be seized and sold on *fieri facias* shall be found within the said state of New Jersey, sufficient to pay such decree, the said court shall further order and decree that the

said corporation, within ten days from and after the service of notice of such decree upon any officer of said corporation upon whom service of process may be lawfully made, or such notice as the court shall direct, shall assign and transfer to the trustees or receiver appointed by the court, any chose in action, or any patent or patents, or any assignment of, or license under any patented invention or inventions owned by, leased or licensed to or controlled in whole or in part by said corporation, to be sold by said receiver or trustee for the satisfaction of such decree, and no injunction theretofore issued nor any forfeiture of the charter of any such corporation shall be held to exempt such corporation from compliance with such order of the court; and if the said corporation shall neglect or refuse within ten days from and after the service of such notice of such decree to assign and transfer the same to such receiver or trustee for sale as aforesaid, it shall be the duty of said court to appoint a trustee to make the assignment of the same, in the name and on behalf of such corporation, to the receiver or trustee appointed to make such sale, and the said receiver or trustee shall thereupon, after such notice and in such manner as required for the sale under *fieri facias* of personal property, sell the same to the highest bidder, and the said receiver or trustee, upon the payment of the purchase-money, shall execute and deliver to such purchaser an assignment and transfer of all the patents and interests of the corporation so sold, which assignment or transfer shall vest in the purchaser a valid title to all the right, title and interest whatsoever of the said corporation therein, and the proceeds of such sale shall be applied to the payment of such unpaid taxes, together with the costs of said proceedings."

"162. PROCEEDINGS FOR READJUSTMENT OF EXCESSIVE OR UNJUST ASSESSMENT.

"The officers of any corporation who shall consider the tax levied under the provisions of an act to which this act is a further supplement, excessive or otherwise unjust, may make application to the state board of assessors for a review of the assessment and a readjustment of the tax; *provided*, there be filed with the said board *within three months from the date of assessment* a petition of appeal, duly verified according to law, stating specifically the grounds upon which the appeal is taken and the reasons why the tax is considered excessive or unjust; the state board of assessors shall thereupon proceed to investigate the contentions raised by the said petition of appeal; and for the purpose of such hearing, the officers of said corporation may be summoned to appear before said board, either in person or by attorney, and questioned as to the statements set forth in the said petition of appeal; if, in the opinion of a majority of the board, it shall appear that the tax so levied as aforesaid is excessive or unjust, they shall thereupon require the officers of the corporation to file with the board a corrected return, and upon said corrected return the assessment shall be adjusted and the tax reduced or amended as in the opinion of the board shall seem proper."

"163. RIGHT OF APPEAL WAIVED AFTER THREE MONTHS.

"If the petition of appeal shall not be filed within three months from the date of assessment as aforesaid, *the right to appeal to the state board shall be considered and treated as having been waived* and the amount of tax levied shall be payable and collected as other taxes levied by said board."

Under Section 64 A, of the Bankruptcy Act, it is provided that the court shall order the Trustee to pay *all taxes legally due and owing* by the bank-

rupt to the United States, state, county, district or municipality, in advance of the payment of dividends to creditors, etc. It is under this section of the Bankruptcy Act, and under the aforesaid sections of the statutes of New Jersey, that appellant claims the right to payment in full.

It will be noted that the language of the New Jersey statute is not so clear and unambiguous as to create a tax by its terms. Thus, throughout the section in question, the words "license fee" and "franchise tax" are used interchangeably. Further, it appears that the charge is based entirely upon the *amount* of capital stock issued and outstanding at a certain time, regardless of the *value* of the stock, and regardless of the *quantity of property* which the particular corporation may then own. It appears further that the tax, when determined, *constitutes a debt* due from such company to the state, for which an action at law may be maintained after the same has been in arrears for a period of one month. The state is given *no other remedies* than such suit for the *collection* of the license fee, but may forfeit the franchise.

It thus appears, from these peculiar provisions, that the state does not itself consider that it is assessing or collecting *a real tax* and that it has not resorted to the usual and ordinary method of collection, which the sovereign exercises to collect taxes, namely, the creation of a lien upon property of the corporation, or the seizure and sale of property of the corporation, for the payment of such taxes. *On the contrary, the state expressly converts this charge into a debt,* to be collected by suit at law, and upon failure of the corporation to pay such

debt, takes away what it has given, and brings to an end the life of its creature by forfeiting its charter and franchise.

Much of the argument that has been made by appellant upon the question of whether this charge is a tax, is based upon the erroneous use of the words "tax" or "franchise tax" in speaking of a charge such as this. First as to the word "tax."

Cooley says, in his work on Taxation, p. 17:

> "Taxes are not contracts between party and party, either express or implied, but they are the positive acts of the government through its various agents, binding upon the inhabitants and to the making of which and enforcing of which *their personal consent, individually, is not required.*"

It is said that the word "tax" has been used at different times to cover every possible species of enforced contribution to the public treasury, but it is clear that such use of the word is highly untechnical, and that it has come, in a mistaken sense, to mean any charge exacted by the state or the sovereign, which is used for the public revenue regardless of whether such charge is the result of a bargain between the state and the citizen, or whether it is a sum demanded and collected in spite of the citizen.

In *State* v. *Western Union Telegraph Co.*, 73 Me., 527, the court said:

> "The word tax has at different times been applied to nearly, if not quite every, burden imposed on person, property or business, for the support of the government, and acts for raising revenue for public purposes, it seems

to be used as meaning the same thing as impost, duty or excise."

Again, in Cooley on Taxation, Vol. 1, p. 6, we find the following definition:

> "An impost is a duty laid on imported goods and merchandise, in a larger sense, *it is any tax or imposition.*"

Again, in *North Jersey City Ry. Co.* v. *Mayor of Jersey City,* 63 Atl. Rep., 83, decided by the Supreme Court of New Jersey, June 11, 1906, the court comments upon the looseness of the use of the term tax and says (quoting the Court of Appeals of New York):

> "Both in statutes and in judicial decisions, the term 'tax' is frequently used in a much more comprehensive sense than that which we have stated to be its accurate meaning. It is not used so broadly as to include the revenue from private property which the state or one of its political divisions may hold for emolument the same as other owners; but it certainly is used to comprehend *exactions for the privilege of exercising franchise rights which latter are often, especially in the case of foreign corporations, merely the consideration received for privileges which the state is at liberty to grant or to withhold, at pleasure.*"

This quotation was taken from the case of *Heerwagen* v. *Cross-Town St. Ry. Co.,* 179 N. Y., 99.

The same language was again quoted by this court in deciding *N. Y. ex rel. Metropolitan St. Ry. Co.* v. *Tax Commissioners,* decided May 29, 1905, and reported in 25 Supreme Court Rep., p. 705.

In that case this court further said:

> "We are not disposed to undervalue the force of these suggestions (referring to the language of the New York Court of Appeals just quoted), but it would be giving them undue significance to hold that they are bound to displace the power of the state to subject to the burdens of taxation property within its limits. The word 'tax' is not infrequently used in a general sense as denoting a burden or charge, and not in the strict legal sense of a charge or burden imposed by the state for the purposes of revenue for its support. Undoubtedly the payment for the franchise of an annual sum was a burden and in that sense it might not unnaturally have been spoken of as a tax. Being recognized as a burden, it may also well be that when the franchise itself was of comparatively little value the legislature did not see fit to subject it to the burdens of ordinary taxation. * * * These annual charges are not called taxes, but are spoken of as in the nature of a tax, and the legislature, recognizing the equitable force of the claim based thereon, provided that the corporation be given credit for sums thus payable."

The judicial meaning of the term "tax" seems to be an enforced proportional contribution from persons and property levied by the state, by virtue of its sovereignty, for the support of government and for all public needs. It is however such a contribution *as is demanded and required* by the state, regardless of the consent of the citizen. As the Circuit Court of Appeals said in its opinion,—"the state does not bargain with the subject, but commands,"—and in respect to a corporation the state does not *compel* a corporation to accept a charter, but in effect *bargains* with the incorporators to give

them certain privileges or franchises, *in exchange for certain payments.*

It has thus been seen, that the first reason for confusion in the language of the New Jersey statute in question lies in the use of the word, "tax," in referring to the license fee. Such a use is entirely unnecessary and adds nothing to the meaning of the phraseology. The words, "license fee," are quite as explicit and mean everything that the words "franchise tax" stand for. The latter words may just as well be stricken out of the sections in question, as their use does not assist in the construction or meaning.

The second point of confusion arises from the use of the words, "franchise tax." This expression also has grown to have many meanings. The franchise of the corporation is of two kinds, *to be* and *to do.* The franchise *to be,* concerns itself merely with the bare existence of the corporation. It is given the right to live as a citizen of the state which creates it. The franchise *to do* on the other hand is accompanied by the acquisition of tangible property, by valuable rights and privileges which can be passed on to transferees under proper conditions and for which the corporation can obtain in many cases large sums of money, in exchange. It is unnecesasry to cite examples to this court. These distinctions are elementary here and are thoroughly understood.

The Statutes in question do not attempt to levy a tax upon property, that is upon franchises to do, or upon valuable rights or contracts which are susceptible of pecuniary estimation. They seek only compensation from the corporation *for the right to live,* without in any way relating the amount of the com-

pensation to the *value of the corporate property.* There is no difference between this form of exaction and the other form in such common use, whereby states cause foreign corporations to pay an annual license fee for the privilege of doing business in a different state, than the one of its creation. In such case the corporation may or may not avail itself of the privilege, but if it does, it contracts to pay certain stipulated amounts annually.

Further, a careful reading of the Statutes in question discloses that the state does not seek to collect the license fee *out of property within its borders.* If it did, it would surely protect itself in an easy method of making such collection by lien, levy and sale. The Statutes are silent in this respect, but they provide for the transformation of the "tax" *into a debt,* and for the collection thereof by action at law.

The statutes making the license fee a debt should be controlling, so plain is their language. Where the state is placed on an equal plane with other general creditors, no tax can be created in the nature of things. It is elementary that a tax is not a debt.

It is said:

> "A tax, in its essential characteristics, is almost universally held not to be a debt or in the nature of a debt; the distinction between a debt and a tax is that the one rests upon contract and the other does not. A debt is a sum of money due by contract, express or implied, while a tax is a charge upon person or property to raise money for public purposes and operates *in invitum.*"
>
> Am. & Eng. Ency. of Law, Vol. 27, p. 580, and cases.

Lane County v. *Oregon*, 9 Wall., 71.
Merriwether v. *Garrett*, 102 U. S., 513, 514.

The charge in question is not enforced under the general revenue act of the state, and by a long line of New Jersey decisions, it is held not to be a tax on property. It is clear, therefore, that the characterization of the charge as a *tax* in the statutes itself, or as a *franchise tax*, means nothing when considered with reference to the real nature of the claim and that nothing can be argued as to its nature by reason of such nomenclature.

In the recent case of *American Smelting & Refining Co.* v. *Peo. ex rel. Lindsley*, 82 Pac. Rep., 581, the nature of a similar license fee was inquired into by the Supreme Court of Colorado, in the quo warranto proceedings brought against the corporation in question to forfeit its franchise by reason of its failure to pay the annual state license tax. After this corporation had paid all of the fees and license charges required by the state for the privilege of doing business in Colorado, the General Assembly, by a law passed in 1902, required the annual payment of an additional yearly license fee and it was this latter charge that the corporation refused to pay. There also the state was authorized to forfeit the charter in case of non-payment and this action was taken, and approved by the court below.

The court found that the charge in question was not a property tax but a "business tax" or excise, but when considering whether the assessment and collection thereof violated certain provisions of the state and federal constitutions, the court said:

"The fee paid to the Secretary of State for

the use of the state, when the certificate is filed, *is not in any sense a tax.* It is the conventional price or bonus which the corporation pays to the state for the privilege of entering its state to do business as a corporation, subject to all legitimate taxation which the state may impose upon the property that it may acquire in the exercise of its franchise rights and upon the use of the privileges thus purchased. The right or privilege to be a corporation is a franchise itself, often called a primary franchise, and while it was not this franchise which appellant obtained by the payment of the filing fee, because that had already been granted by the state of New Jersey, yet it was for the right to come into this state and do business, as a corporation, that the bonus was exacted. The secondary franchise, or right to make use of the purchased privilege, which the books denominate the franchise to do, is entirely distinct and separate from the franchise to be or to exist here as a corporation. These distinctions are recognized by the highest authorities."

In *Central Pac. Ry.* v. *Cal.*, 162 U. S., 91, the court says:

"The right and privilege or franchise of being a corporation is of value to its members, and is considered as property separate and distinct from the property which the corporation may acquire, and we add distinct from the franchise or privilege it secures to carry on the business which it was organized to transact."

The learned counsel for appellant have referred to many New Jersey cases for the purpose of impressing the court with the fact that the New Jersey courts have often *called* the imposition in question a tax, arguing therefrom that because so called, it is in fact a tax. We are unable to perceive the

value of this argument. Merely calling a thing for convenience by an arbitrary name does not in any sense change its essential nature. It is quite natural that such an exaction should in general terms be called a tax, because it is payable to the state at definite times and is used for public purposes. These facts, however, would in no way control its classification as a tax.

Unfortunately for counsel, the cases referred to as settling the question that the license fee is a tax, do not, in a single instance, decide the question in counsel's favor and in most cases do not attempt to decide the question at all. *Wherever it is decided in those cases, however, it is held that the exaction is not a tax in the real meaning of the term.*

Turning to the authorities cited, we begin with *State* v. *Evening Journal Association,* 47 N. J. L., 36. Counsel say this case holds the license fee to be a tax. On turning to the opinion, we find that the only question that the case pretends to decide, is that the Evening Journal Association *was not a manufacturing company,* within the meaning of the proviso of the fourth section of the Act of 1884, Chapter 159, which exempted manufacturing companies. among others, from the payment of the license fee. The entire opinion is taken up solely with that question, and nothing contained in it sheds any light upon the nature of the license fee as a tax. It is true that the opinion uses the word "tax" in referring to the exaction, but we submit that that is of no importance whatever.

In *Standard Cable Co.* v. *Attorney General,* 46 N. J. Eq., 270, the nature of the license fee was dis-

cussed. The complainant contended that the collection of the license fee in question, if it were held to be a tax, would be violative of the state constitution, which provided that property should be assessed for taxes under general laws and by uniform rules according to its true value. On this point the court said, page 273:

> "The fault of this position is the assumption that this tax is only upon property. Such manifestly is not the case. The law in question imposes a tax on certain corporations *by way of a license* for exercising corporate franchises. It is declared to be such tax by the act, and although it is laid on this class of corporations with respect to the capital stock, the tax possesses the legal quality of a *license* or a franchise tax. Upon the power of the legislature to impose such a tax, there exists no restriction in our constitution. As a *license* or franchise tax, it is not within the equality clause of the constitution referred to."

We submit that the court does not determine the exaction to be a tax, in its essential nature, but merely a license fee, called by the other term of "franchise tax." And it will be seen when discussing the *U. S. Car Co.* case, 60 N. J. Eq., 514, hereafter, that the court later determined that it was not in reality a franchise tax, but a bare license fee.

Turning to *Pipe Line Co.* v. *Berry,* 52 N. J. Law, 305, cited by counsel as indicating that it was considered a tax by the court, we find that the Pipe Line Company, a Pennsylvania corporation, complained *of a real estate tax,* because it had been obliged to pay the license fee in question. The distinction which the court points out in this case, between the license fee and the real estate tax in

question is that by the license fee revenue for the state was meant to be provided, while by the real estate tax revenue for local purposes was raised. But nothing contained in the opinion attempted to change the nature of the license fee into a tax, in the real meaning of the term.

In *Lumberville Bridge Co.* v. *Assessors,* 59 N. J. Law, 529, also cited by counsel, the corporation resisted the payment of the license fee. The court in passing upon the question whether the collection of the charge in question constituted a regulation of interstate commerce, quoted the language of *Railway Gross Receipts* case, 82 U. S., 284, saying:

> "Every tax upon personal property or upon occupations, business or *franchises,* affects more or less the subjects and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it within the meaning of the constitution."

And the court further said, commenting upon that language:

> "This language is quoted not because the word *'franchise'* is there used in the precise sense to be presently ascribed to it, but for the purpose of showing that the payment for a state privilege may exceedingly affect commerce without being in a constitutional sense a regulation of it. The franchise that is taxed as property is the privilege enjoyed by a corporation of exercising certain powers derived from the state, whereas the franchise with which we have to do is the right to exist in corporate form, without reference to the powers that under such forms the company may exercise. This distinction, although formulated by Mr. Justice Field in *Home Ins. Co.* v. *New York,* 134 U. S., 594, was not strictly adhered to in his sub-

sequent expressions, probably because there was nothing in that case to call for a nice use of terms. In this state we tax each *of these so-called franchises.* The former, as in the case of the right to own and operate a railroad, is taxed as property having a true value, which it is the duty of the state board to ascertain for the purposes of constitutional assessment. On the other hand, the naked right of existing in corporate form is taxed as in the case before us, not at its true value, as it would have to be if it were property, but at a sum arbitrarily imposed by the legislature, *as an annual fee,* the amount of which is to be computed by reference to the capital of the company as a criterion."

It will be seen that the court therefore refused to consider this charge as an annual franchise tax, but called the payment an *annual fee.* Will it be said that this classifies the exaction as a tax? And yet this is one of the cases that counsel rely on in their statement that the New Jersey courts hold the fee to be a tax.

It would therefore be quite as logical to claim that all moneys which the state collected and which went into the public treasury, were taxes, *simply because they went for the payment of governmental expenses,* as to say that the exaction here in question is a *tax,* merely because it is *called a tax* in the statutes. The use of that term by itself means nothing.

Now the State of New Jersey has often had occasion to contend that this license fee or franchise tax was not in fact a tax, and also that it was a tax. Where the State attempted to collect such a license fee and was resisted in the attempt by the

corporation, upon the ground for instance, that the corporation had a special charter which exempted it from any but specified taxes and impositions, the State has contended that the license fee was not a tax or impost.

Hancock v. *Singer Mfg. Co.*, 62 N. J. Law, 289.

And, again, in other cases, where the corporation claimed that the charge was illegal because it constituted a tax on property, the state has claimed that it was not a tax on property, and has persuaded its courts to so hold.

Standard Cable Co. v. *Atty. General*, 46 N. J. Eq., 270.

So, also, in *In re Danville Rolling Mill Co.*, 10 A. B. R., 327, the state attempted to obtain priority in bankruptcy on a similar license fee and to avoid the force of the *U. S. Car Co.* case, holding the claim *not a tax*, argued that the license fee arose *on an implied contract*. How does that argument assist the state here on a claim that it is a tax?

The cases in bankruptcy, which have arisen under the Act of 1898, relative to the construction of Section 64 A, have been very few. Two of the cases are diametrically opposed to each other upon the very question involved in the case at bar. Thus, in *In re Danville Rolling Mill Co.*, 10 A. B. R., 327, decided April 3, 1903, by the United States District Court of Pennsylvania, the State of New Jersey made a similar claim in the bankruptcy proceedings, for priority and Judge McPherson denied it upon the ground that by the decision of the Court of Errors and Appeals of New Jersey, in *In re U. S.*

Car Co., 60 N. J. Eq., 514, it was held that the license fee or franchise tax *was not a tax at all*, and that therefore the State could not be permitted to claim in any other forum the unusual boon of priority for the demand as a tax. The court says:

> "The learned Referee was right, I think, in disallowing the claim of the State of New Jersey, founded upon its Revenue Act of April 18, 1884, for a license fee, or franchise tax, for the year 1901. The Court of Errors and Appeals of New Jersey, in the *U. S. Car Co.*' case, 60 N. J. Eq., 514, has used this language concerning the annual sum exacted from corporations under the provisions of this statute: '*Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax at all, nor has it the elements of one.* It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property, or of its franchises and without regard to whether it exercises the latter or not, solely as a condition of its continued existence.' In the State of New Jersey, therefore, the sum in dispute is not a 'tax,' and accordingly can not be allowed under Section 64, clause (a) of the Bankrupt Act. For, after a declaration by its highest court, that the annual charge was not a tax, properly speaking, the State could not be permitted to claim, in another forum, that the charge was nevertheless included in the language of the Bankrupt Act, that requires the trustee to pay 'all taxes legally due and owing to the United States, state, county, district or municipality.' "

Again, in *In re Ott*, 2 A. B. R., 637, decided by the District Court for the Southern District of Iowa, July 5, 1889, the mulct tax of Iowa was construed and the claim of Scott County therefor was denied priority. In that case the legislature had surround-

ed the tax with every apparent incident going to make it in fact a real tax. Thus, it provides for the levying of the tax, and its collection by the treasurer in the same manner that other delinquent taxes are collected, for the sale of the personal property used in connection with the business or of the real estate where the business is carried on,—it provided that all the provisions of law as to tax sales should apply to such sales made for delinquent mulct taxes and that the taxes collected should be paid into the county treasury. Every incident of taxation seems to have been given to the mulct tax in question. The statute *denominated it a tax,* spoke of it throughout *as a tax* and provided for its assessment and collection by the same officers performing like duties as to taxes generally. *Finally it was given the same lien as other general and special taxes.*

The court, however, turned to the opinions of the Supreme Court of Iowa, and found that in *Smith* v. *Skow,* 97 Iowa, 640, where there was a contest between a mortgage and the lien of the mulct tax, the Supreme Court held that it did not constitute a tax as the court used that word.

> "It matters not that the legislature, in the statute, speaks of this license or charge as a 'tax.' That does not make it a tax. It is in reality a charge or license exacted for the privilege of carrying on the business of vending liquors, which charge is made by statute a lien upon all property, both personal and real, used or connected with the business."

The court therefore considered that it was bound by the decision of the Supreme Court of Iowa, to the effect that the mulct tax was not a tax, and refused priority to the claim of the county, saying:

"It is not for this court to contest such decided fact. The State, by its proper authorities, legislative and judicial, has enacted the statute creating or levying a tax, and then construed and determined the force and effect of such statute, and this court, after the Supreme Court of this State has construed it, accepts such statute as though such construction had been placed in the statute at the time of its enactment. If the statute had expressly declared that, although called a 'mulct tax,' the penalty or tax (or whatever the statute named it) was not in fact a tax, but only 'a charge or license enacted for the privilege of carrying on the business of vending liquors,' this court must coincide with the statute, and regard it, not as a tax, but merely as 'a charge which attaches to, and becomes a lien on, the real estate,' etc. Again, it is not for this court, but rather for the State, through its supreme lawmaking body, to declare that a claim that may thereafter exist in its favor shall be a tax or not. Unless the State so shapes and legislates with regard to such claim as that it becomes a tax, and not a mere charge, this court may not attempt to supply whatever, in the judgment of the Supreme Court of the State, may be required to make it a tax. *The bankruptcy statute certainly intended this priority of payment should be given only to those claims existing in favor of the State or municipal corporations, which the State had clothed, not only with the garb, but with the actual nature, the 'in reality,' of a tax.* This court, therefore, must decline to give to the claim presented greater force or effect than the State has itself declared the claim shall possess."

But in *In re Mutual Mercantile Agency*, 8 A. B. R., 435, where the State of New Jersey filed a similar proof of claim for priority, the Referee followed the *Ott* case (*supra*), in so far as it declared that the

Bankruptcy Courts should follow the construction given by the highest court of the state to the question of whether the claim was a tax in fact, but found that in *Hancock* v. *Singer Mfg. Co.*, 62 N. J. Law, 289, the Court of Errors and Appeals of New Jersey had decided that the franchise tax was in fact a tax, and the Referee ordered that the state should be allowed the claim as a priority.

It will thus be seen that these two cases proceed upon the irreconcilable theory that at one time the State of New Jersey considers the claim in question a tax, and at another time it takes the position that the claim is not a tax. Upon examination of the two cases, however, it is readily seen that the conflict is more apparent than real and that the state does not indeed consider the claim as being in its essential nature a tax.

The *Singer* case presented only the construction of an exemption clause in the charter of the Singer Manfacturing Co. This exemption provided that the real and personal property of the said corporation, not actually and in fact within the State of New Jersey, and the stock of the said corporation held or owned by any of its stockholders, should not be liable *to any tax or imposition whatsoever.*

The same question had arisen for the first time in 1891, reported under the name of *Singer Mfg. Co.* v. *Heppenheimer,* 58 N. J. Law, 634. In an opinion there rendered by Judge Van Syckel, it was said that the question to be solved was, whether that part of the charter constituted an irrepealable contract with the state, and if it did, *whether the imposition of the license fee violated such contract.* The court held that the contract was irrepealable and that the word

"*impost*" used in the charter *included every kind of enforced contribution to the public treasury.* The court found that the object of the exemptions clause was to prevent the state from levying an indirect imposition upon the property of the company aforesaid by the state, because it was well understood that the state could not impose a direct tax upon property located beyond its jurisdiction. The court said:

> "It is an attempt to do by indirection what it is agreed in the contract shall not be done. The fact that it is styled *a franchise tax* can not validate it. It is none the less an interdicted imposition because it is given a new name. The franchise of the company is the right to hold property and exercise its corporate privileges. All those rights and privileges were granted to the company by its charter upon the terms specified in it. Those terms can not be changed or altered without the consent of both parties to the charter contract."

In 1897 the State of New Jersey again attempted to collect the franchise tax from the Singer Mfg. Co., and the corporation was again obliged to defend itself from this attempt. That case is reported as *Hancock* v. *Singer Mfg. Co.*, 62 N. J. Law, 289. The case was argued most fully and by eminent counsel. The point upon which great emphasis was laid in the argument was that *all of the questions involved had been previously litigated in the Heppenheimer case* (*supra*) *and that the court could not reconsider it.* Further, it was argued that the charter exemption clause was broad enough to cover such a demand as the franchise tax or license fee.

Judge Van Syckel again wrote the opinion of the

court, and reiterated his language used in the *Heppenheimer* case. He found that good faith on the part of the state required the performance of the contract not to impose *any other charges or burdens of any kind* upon the corporation, and he said, page 333:

"The state pledged exemption not from taxation only, *but from any imposition whatsoever.*

"Much of the brief on the part of the state is devoted to proving that, at the time the Singer charter was granted, the accepted meaning of the word 'impost' was 'a tax or tribute or levy upon goods brought from out of the state or country into it,' and the familiar rule was invoked that after a practical construction has been given to language by judicial decision, it will be presumed that it has been adopted with the meaning so given to it.

"The imposition resisted by the company in this case is laid upon the entire capital stock of the company of $10,000,000, less the value of its real and personal property in this state, and is in effect as much an impost on property out of this state as if it were put directly upon property itself and not upon the capital which stands for and represents it. It is an attempt to accomplish by indirection what it is stipulated shall not be done. It is an effort to levy a franchise tax out of the many millions of dollars of its capital invested by the company in real and personal property outside of this state.

"The act of 1884 (Pamph. L., p. 232) is entitled 'An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof.'

"In that act this imposition is called a yearly license fee or tax.

"In a supplement passed to the act of 1884 (Pamph. L., p. 136) it is called 'an annual license fee or franchise tax.'

"It is wholly immaterial what name may be

given to it. The fact that it is called a 'license fee' or 'franchise tax' can not validate it. It is levied under an act passed 'to authorize the imposition of state taxes,' *and it is none the less an interdicted imposition,* and none the less a tax because it is given a new name.

"Although under our adjudications it is not a tax on property in a sense which brings it within article 4, section 7, paragraph 12, of our state constitution, it is a tax on the capital stock of the corporation. Otherwise the act would be manifestly void for want of a title expressing its object, and the state would be deprived of all its revenue under the act of 1892. The franchise of the company is the right to hold property and exercise its corporate privileges. The Supreme Court of the United States has decided that where a corporation is exempted from taxation, it is not subject to a tax on its franchise. *Wilmington Railroad Co.* v. *Reid,* 13 Wall., 264.

"All the rights and privileges which the company is empowered to exercise were granted to it by its charter upon the terms therein specified. Those terms cannot be changed or altered without the consent of both parties to the charter contract. *The right to make further exactions from the company under any pretext* involved the power on the part of the state legislature to render the grant to the company futile and of no value, by impositions of like character, to such an extent that the business of the company cannot be prosecuted with profit to the shareholders. That an impost laid upon the entire capital stock is a burden on each share into which such capital stock is divided, in the hands of its several holders, is too clear to be doubted. The proposition that an imposition may be laid upon the aggregate of the capital stock, which is expressly forbidden to be levied upon the several parts which constitute the whole thereof, is so absolutely devoid of merit that it cannot be assented to."

And, again, Judge Vredenburgh, in his separate opinion, page 341, says:

> "The Act of 1892 in question demonstrates the present exaction of a license fee or franchise tax, and it is imposed for the purpose of revenue upon the occupation of the company in general, and without restriction to any locality. It is not a tax assessed upon any basis of valuation of the property of the company, but is arrived at annually by the mere multiplication of the amount of the company's issued capital stock by the arbitrary per centum fixed in the act."

And on page 343:

> "Under the tax classification adopted by this court in the case of *Standard Underground Cable Company* v. *Attorney General,* 1 Dickinson's Chancery Reports, 270, the assessment in question, *speaking in the strict constitutional sense,* must be defined to be a franchise tax as distinguished from a property tax. This as a legal definition, must be accepted as correct, but while a franchise tax is not one levied directly upon property, and is not, therefore, to be named a 'property tax,' it is, when imposed in substantial sums for purposes of revenue as in the present instance, a tax burden upon the income of property. Unless we follow the name and shadow merely, and lose sight of the substance of things, the intent of the parties, in the use at the close of the exemption clause, of the comprehensive words, viz., 'shall not be liable to any tax or impost whatsoever,' is as clearly expressed as if they had instead appended thereto the words, 'whether such tax or impost be ascertained in the form of an assessment upon the value of such property or in the form of a franchise tax, fixed by a percentage upon the capital.' In either case the governmental burden to be borne by the com-

pany and paid out of the earnings of the property for the privilege of using it to carry on its extra territorial business will be increased, and its net earnings decreased to that extent, in disregard of the real intent and just expectation of the contracting parties."

And, again, page 344:

"The exaction annually of this license fee of $4,212 by the compulsory power of the state though not in form a tax upon the property of this corporation outside of this state, is, in fact, a burden upon the annual earnings of that property, and must of necessity be paid out of them either in whole, or, if not, certainly in large part, and thus falling on them is, *in a manner, as we have above argued, a tax upon that property*, and to such extent, at least, 'abridges' the intention of the parties."

The findings of the court upon the question of whether the license fee was an impost or tax was *totally unnecessary to the decision* in view of the positive conclusion of the court that the state was foreclosed by the former adjudication. Furthermore, the parties were in a court of equity and with the clear intention to exempt the corporation and its property *from charges or exactions of any kind* outside of those previously agreed upon, it is not surprising that the court should hold that a license fee whose payment could be enforced by forfeiture of the charter and by the appointment of a receiver was an impost, or in other words, *was an enforced contribution to the public treasury.* The *Singer* case, when carefully considered and analyzed, furnishes but small comfort to the appellant, especially when read in the light of the separate opinion of

Judge Vredenburg holding that the imposition is *"in a manner, a tax."* We submit that any other exaction, whether it had been imposed under the name of a tax, fee, charge, exaction or whatsoever, would have fallen equally under the ban of the court, in view of the special provisions of the Singer charter as did this "license fee or franchise tax," because any other form of charge or imposition would have equally been payable out of the capital or income of the company, and hence would have fallen upon its stockholders ultimately, in the same way that the license fee was held to, in that case.

But the court expressly refused to decide the case upon the question whether or not the license fee was a tax, and rested its final decision upon the proposition that the *Heppenheimer* case disposed of the question and that it would not permit the state again to re-open and re-argue the same questions. The court says, page 340:

> "In the case reported in 29 Vroom., the conditions and questions to be solved were identical with those here presented, the only difference being that in this case the tax is for a subsequent year. Unless the question involved is *res adjudicata,* it can never become so; the unsuccessful litigant may year after year continue to vex his adversary and the court with the same questions which have been decided.
>
> "The attempt now to reopen questions which have been once adjudged by this court, by trying to enforce a subsequent tax of the same character, should not be contenanced. It is contrary to the traditions of this court; no precedent can be found for it from the foundation of this court to the present time.
>
> "The judgment of this court must be re-

garded as a finality. It is established to review the decisions of inferior courts and discontented suitors cannot invoke its aid to review and set aside its own deliberate judgments.

"The questions sought to be reopened in this case should be regarded as closed and no longer a subject of controversy between these parties, and in accordance with the former judgment of this court the judgment of the Supreme Court, setting aside the tax against the company, should be affirmed."

While the state of New Jersey stands at this bar demanding the payment of the license fee as a tax upon the assumption that it has been declared to be a tax by its own highest courts, we find, upon turning to the briefs filed by the state of New Jersey in the case of *Hancock* v. *Singer Mfg. Co.*, 62 N. J. Law, 295, *that the state earnestly and ably argued in its briefs in that case that the charge was not a tax, and was not an impost, but that it was a mere license fee.* The title of that portion of the brief of the state is stated on page 292 as follows: *"An exemption from tax or impost does not include license,"* thereby clearly indicating the position of the state to be that the license fee in question was not a tax. Again, the state said in its brief (p. 295) that Mr. Justice Van Syckle had declared the exaction to be a *franchise tax,* and that the act itself called it a *license fee;* that the original act of 1884 called the contribution *a license fee or franchise tax;* that the courts of the state had upheld its constitutionality on the ground that it was *not a property tax,* and said:

"A lax use of the term *'tax'* obtains in the expression 'license tax,' tax meaning in this

> construction the pay part of the license, quite as a man would say, 'My butcher *taxed* me too much for my roast.' Such use makes a license tax mean a license to sell something on paying the fee."

Again the state says, page 295:

> "*A license differs from a tax* in that it consists of a right granted by competent authority to do an act which, without such authority, would be illegal as distinguished from a mere rate or sum of money assessed upon the person, property or business of the citizen."

Throughout its brief the state emphasized the point that this charge or contribution *was not a tax, nor an impost, but a mere license fee,* payable as a contractual obligation, not in the nature of a tax, but in the nature of a bargain made between the state and the corporation. It is true the state was defeated upon the merits of the case, but as we have pointed out, the reason for the defeat was that the court considered *any charge or contribution exacted* by the state as unconscionable and uncollectible, in view of the clear provisions of the language of the exemption clause in the charter, and further, that the same question had been previously litigated and decided in the *Heppenheimer* case. We therefore maintain that nothing in either the *Heppenheimer* or *Hancock* cases justifies the assertion of counsel that the question decided in either case was whether or not the license fee was a tax.

It will thus be seen that neither the *Heppenheimer* case nor the subsequent *Hancock* case involved what counsel assumes. *These cases did not*

decide whether or not the license fee was in reality a tax. In both cases the State of New Jersey was obliged to contend and did contend *that the license fee was not a tax.* The admission by the state that it was a tax would have been fatal to its contention that the exemption clause of the Singer Mfg. Co. was not invaded by the levying of a license fee. The court, however, decided the *Heppenheimer* case upon the proposition *that any imposition, regardless of its name or nature, which the corporation was obliged to pay to the state, was an invasion of the exemption provision.* In the second *Singer* case, the court reaffirmed this contention, but decided the case upon the proposition that all of the issues had been disposed of in the first *Singer* case, and that to reopen them would be violative of every precedent and tradition of the court.

Eight months after the last *Singer* case had been decided, the Court of Errors and Appeals handed down an opinion in *In re U. S. Car Co.,* 60 N. J. Eq., p. 514.

In that case a corporation, chartered by New Jersey, became insolvent. The receivers rejected the claim of the state for a franchise tax, and had not in their hands sufficient to pay the debts of the corporation. It was argued that the receivers had not conducted the business of the corporation, nor exercised any of its franchises. The question presented for decision was, whether the state was entitled to priority in payment of the franchise tax, out of the assets in the hands of the receivers. The Chancellor held, that the tax was not payable in

advance of the claims of creditors, upon the theory that the franchise was a valuable asset to the receiver and that therefore nothing could be due to the state. The Court of Errors and Appeals, however, reversed the decree below, saying:

> "We cannot concur in this view. *Although the statute designates an imposition of this kind as a license fee or franchise tax, it plainly is not a tax upon corporate franchises. In fact, it is not, strictly speaking, a tax at all, nor has it the elements of one.* It is in reality an arbitrary imposition laid upon the corporation, without regard to the value of its property or of its franchises, and without regard to whether it exercises the latter or not, solely as a condition of its continued existence. The state, in creating a corporation, has the right to impose upon its creature such conditions as the legislature, within constitutional limits, may deem proper, and the acceptance by the corporation of the franchises, powers and privileges conferred upon it binds it to the performance of those conditions so long as it continues to remain in possession of those franchises, powers and privileges, and the conditions themselves remain unrevoked by the legislature. And this is so without regard to the solvency or insolvency of the corporation, the value or want of value of its franchise, or whether or not it is exercising them, either by its officers and directors or through a receiver. The sole test, in determining its liability to comply with those conditions, so long as they remain unrevoked, is the existence or nonexistence of the corporation.
>
> "Applying this test, it is quite clear that *the so-called tax* was properly imposed in the present case. At the time of its imposition, although the company had been decreed to be insolvent, no decree of dissolution had been pronounced against it, but, on the contrary, its corporate

life was continued for the benefit of its creditors pending the final distribution of its assets.

"But it is contended on behalf of the receivers that even if it be considered that this '*tax*' was properly laid, still, by force of the statute under which it was assessed, it became 'a debt due to the state when determined,' and that, as it was not 'determined' until some months after the receivers were appointed, it was, distinctly, not a debt of the corporation at the time of their appointment, and consequently is not payable out of the assets in their hands, for the reason that, by their appointment, such assets were converted into a trust fund for then existing creditors. In support of this contention *Hollins* v. *Brierfield*, 150 U. S., 371, and Cook, Stock. (4th Ed.), Sec. 9, are cited.

"It seems to us, however, that this contention can not prevail without disregarding the statutory provisions which regulate the subject. Section 6 of the act under which this *so-called tax* is laid declares, as has already been stated, that *such tax shall be a preferred debt in case of insolvency*, and Sections 68 of the Corporation act (P. L. of 1896) provides that 'all the real and personal property of an insolvent corporation, and all its franchises, rights, privileges and effects, shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.'

"It is manifest, therefore, that when the '*tax*' is assessed against an insolvent corporation, after the appointment of a receiver, the fund out of which its payment must be preferred is that which is in his hands, for there is no other fund upon which it can be charged, and, consequently, in no other way can each of these two statutory provisions be given full force and effect.

"The decree appealed from should be reversed, and the receivers directed to pay into

the state treasury the amount of the disputed tax."

It will be noted that the court investigated the real nature of the license fee and interpreted it. Moreover, this interpretation was made in a case where no other question arose and at least eight months after the decision of the case which appellant so earnestly relies upon. The distinction pointed out by the court lies in the fact that the license fee is in no way a tax on the corporate franchise—that the name "franchise tax" was wrongly given to it in the statutes—that it is a *mere arbitrary license fee and not a tax at all.* It was argued in the case that, being a franchise tax, it should not be enforced where the franchise was not used. But the court says it must be enforced regardless of the user *because it is not a franchise tax.* It is merely a *license* to live, and while life remains the charge must be paid under the clause which gives it preference in the event of insolvency. Moreover, wherever the tax is spoken of in the opinion of the court it is either as the *"so-called tax"* or it is put in quotation points to emphasize that the court does not consider it a tax, but refers to it as such because the statute does. Thus the question of its nature was squarely before the court and squarely decided.

Appellant's counsel say that the subsequent case of *Myers* v. *Campbell,* 64 N. J. L., 186, cites the *Singer* case approvingly. This is a totally misleading statement. The opinion shows that the *Singer* case is cited on the point that for the purpose of taxation, corporate property may be represented by

the corporation itself as legal owner, or by the corporate stockholders as beneficiaries. The citation is used for no other purpose and has no value at all in reference to the case at bar.

It is clear, that the State of New Jersey has solemnly asserted, through its highest court, that the franchise tax or license fee is not a tax, and has no element of a tax. It would seem unusual, to say the least, for a court of bankruptcy to insist upon paying as a priority a claim which the highest court of the state in its last deliberate opinion upon the subject has declared to be not entitled to such preference. But the courts of New Jersey, since the decision of the *U. S. Car Co.* case, have again referred to the license fee in *New Jersey Street Ry. Co.* v. *Mayor of Jersey City*, 63 Atl. Rep., 83, decided by the Supreme Court of New Jersey, June 11, 1906, where certain taxes which had been levied were set aside. The franchises which had been taxed in that case were the franchises to do, and the court, after considering whether or not under the Voorhees Act of 1900, the franchise of the corporation had been taxed, held that the franchise tax there mentioned was not intended to be a property tax, and said:

> "That impositions of this character may be imposed by way of a license tax is well settled. Such a tax is imposed by this state upon the general franchise to be a corporation and has been sustained by the courts. (Citing numerous cases.)
>
> "*The grant of the privilege to be a corporation rests in the discretion of the state, and may be made upon such terms as the legislature sees fit to impose. Those terms are open to acceptance or rejection. In this respect, the special franchise to use the streets does not*

differ essentially from the general franchise to be a corporation. It can not be doubted that the legislature or a municipal corporation vested with power to grant or refuse its consent to the special privilege to use the streets, may grant the privilege upon terms. In such a case the imposition may be regarded as in the nature of rent or purchase price for the privilege; but it may also be regarded as in the nature of a tax subject to change by the legislature. * * *

"Whether valuable as property or not, the franchise is to be exercised upon such terms as the state may determine, and it is no objection that those terms take the form of an annual license tax. As a license tax, it is not subject to the constitutional requirement that property shall be assessed according to its true value."

The offer and acceptance, with the payment of a consideration, are the indicia of contract, not of tax. The court would not have spoken thus of a real tax.

Thus we see that the New Jersey courts have consistently adhered to their position that the license fee in question is not a tax. They distinguish it from a tax in that the corporation has an option of accepting life from the state on the terms proposed, or of rejecting the proffer; in other words, there are all the elements present of a contract in an offer and acceptance, parties and subject matter, and we find no element of a tax. True, the money thus paid goes into the public treasury, and is used perhaps for public purposes, but that is true of all sources of revenue. The principal attribute of a tax is that it never becomes a matter of offer and acceptance or of agreement by the citizen, but con-

tinues to be levied and collected, *in spite of the citizen, not as a debt, and not under an express or implied contract.*

In many states of the Union the incorporators pay a lump sum to the state for the franchise *to be,* at the time the charter is issued. Such payment would not in all likelihood be a sufficient defense against the payment of an additional annual license fee, if subsequently the state lawfully were empowered to collect it. But in New Jersey, instead of the lump sum payable at the time of incorporation, there is a different method of payment insisted upon by the state—namely, the division of such lump sum into an annual license fee, payable during all the time the corporation enjoys the franchise *to be.* The incorporators say to the state, in effect: "We prefer to receive our right to exist from you, because of advantages which your laws offer us, and if you will grant us a charter we agree to pay you the annual license fee which you demand by such laws as now exist or as they may hereafter be changed." The state, on the other hand, says, in effect: "If you desire to receive from us the right to live and the right to share in the advantages of our corporation laws, you must pay us a license fee for each year of your life for that privilege, and continue to pay such charges as we may require either now or hereafter therefor." Now, in consideration of the making of such an agreement by the corporation with the state, the latter issues a charter and permits the corporation to enjoy such advantages as the peculiar laws of that state may give to such bodies. It is a clear

contract, and nothing else. It is no objection to this view that the state may increase the annual price, and that the corporation could not refuse to pay the increased price without forfeiting the right granted, because the contract is one whereby the corporation impliedly agrees *to pay the present license fee, or any other or changed license fee.*

In endeavoring to establish their proposition that this is a tax, counsel for appellant take the ground that it must be a tax because it cannot be a contract, and in elaborating this theory they contend that it cannot be regarded as a contract, because the state has power to change the amount of the annual license fee, and their claim is that it is fundamentally inconsistent with the theory of a contract that one party should have any power of changing its terms after it has become operative.

Without entering into a general discussion of this claim as applicable to all kinds of contracts, we submit that it can have no application in the case at bar, and that it is perfectly consistent with the theory of a contract, and with the application of that theory to the question here involved, that the legislature should possess this power. We have not here a case of an unlimited power by one party to so change the terms of the agreement as to put the other party at his mercy, or to make such changes as would destroy the nature of the agreement. Provisions in a contract by which the amount to be paid is to be changed in the future, upon the decision of some third party, are quite common. In the matter of this license fee the corporation is dealing not with an ordinary contracting party, but with *a*

state. The state can make no change in the license fee except by legislation. Such legislation is passed by representatives of the people, in the selection of which all citizens have a voice, and who presumptively exercise their legislative power with reference to the good of the community as a whole. In addition to this a change made by legislation could not be a change made in the license fee to be paid *by a particular corporation*, for such a change would be unequal and unconstitutional. The change, if made, *must be equal and apply generally to all corporations or persons* who fall within the class embraced by legislation. For these reasons we submit that it is no objection to regard this license fee as resulting from a contract with the state, and creating just what the statutes say it shall create, a debt, that the legislature, which as a representative of the state has given the right, may change the amount to be paid in the future, and that the other contracting party, the corporation, had agreed that this may be done. If, when the change is made, the corporation does not desire to pay the increased rate, it may surrender its charter and thus escape any personal liability. Thus the state as a contracting party is not given an unlimited power to impose a greater and a further debt upon the corporation in the future, but only the power to increase the price which the corporation shall pay, if it desires, in the future, to continue the corporate rights which are given to it.

Besides, in New Jersey, under Sec. 4 of the Corporation Act, the charter of every corporation is subject to alteration, suspension and repeal, in the

discretion of the legislature; and by Section 5 the act under which corporate life is given may be amended or repealed at the pleasure of the legislature, *and every corporation created under such act shall be bound by such amendment.* The charter is a contract and the price to be paid therefor by the corporation arises from a contract and is a contractual obligation, subject to the reserved right of the state to alter the annual charge in a lawful manner.

The learned Circuit Court of Appeals, in deciding the case below, was forced to the conclusion that the language of the *U. S. Car Co.* case was not *dictum*, but was clearly applicable to the essential nature of the license fee, and that the question properly arose in the case and its decision was binding as the final decision of the highest court of the state, declaring the imposition not to be a tax. It is difficult to see upon what theory the state can avoid the unambiguous, decisive language of that case, especially when no case decides the charge to be a tax.

In the *Danville Rolling Mill Co.* case, 10 A. B. R., 327, it is plain that the district judge who wrote the opinion was persuaded that the *U. S. Car Co.* case was decisive and that there could be no question under that case, but that the claim of the state for preference must be denied. In the *Mutual Mercantile Co.* case, decided by Referee Allen, following the *Singer Mfg. Co.* case, it is clear, upon turning to the opinion, that the *U. S. Car Co.* case was never brought to the attention of the referee, and that neither the counsel nor the court knew of the existence of the later decision. Certainly, if the

later case had been called to the attention of the court, some attempt would have been made in the opinion to distinguish and to point out why the court should follow the earlier case, especially as the *Singer* case did not decide the question involved, but no such differentiation is pointed out, nor is the later case in any way referred to.

Should it become a question between two conflicting decisions of the highest court of the state, the preference would undoubtedly be accorded to the last decision of the court, on the theory that in making its last pronouncement the court must have had in mind the earlier case, and must have decided to depart from the earlier doctrine. But the Federal courts will not decide for the state that the imposition in question is a tax, *where the state has itself decided that question in the negative,* and if the state is itself *unable* to say, because of conflicting decisions, whether the charge is or is not a tax, surely the Federal courts will not decide such a question in its favor, where the effect of such a decision would be to give the state an unusual privilege *and to deplete the bankruptcy fund at the expense of the general creditors.* As was said by the Circuit Court of Appeals below:

> "It is not for the United States bankruptcy courts to insists upon the state's receiving as a tax under Sec. 64 (a) something which the state declares is not."

Even if the legislature of the state had declared the charge to be a tax, and the courts of the state in construing it had agreed therein mistakenly, the United States bankruptcy courts would not be

obliged to follow such error. The Federal courts in such a case will agree to the construction of the highest court of the state, where the construction is such a one as appeals to the reason of the court; but where application is made *under a federal act* for the payment of moneys to the state, out of funds in the hands of a trustee in bankruptcy, *to the detriment of general creditors, and as a preference to the state,* the question of whether the claim advanced comes within the class *is one for the court of bankruptcy to decide.* The statute says that the court shall order the trustee to pay all *taxes,* clearly meaning *all claims which are in reality taxes,* and not merely called by such name. If the highest court of the state has said that the claim upon which preference is demanded is not a tax, that ought to be sufficient for the bankruptcy court, and a denial of the claim to priority would follow. If the highest courts of the state have mistakenly said that the claim is a tax, it would not be final and binding upon the bankruptcy court in such a way as to preclude the independent investigation required in the language of the statute. The Circuit Court of Appeals said:

> "But if we are mistaken, and if the *Singer Co.* case is to be accepted as an authoritative decision that the charge in question is a tax, we do not believe that the United States bankruptcy courts are bound to follow it blindly. The question with them is the interpretation and application of Sec. 64 a. If the legislature of a state gives the name tax to an exaction which is not a tax, and if the courts of a state join in the misnomer, surely the bankruptcy courts are not required to disregard the substance of the thing, to the detriment of other

> claimants. The state courts may authoritatively expound the substance, and the federal courts will adopt such exposition; but whether the substance constitutes a tax or not is independent of the name. And, moreover, the latter part of Section 64 a seems to direct the bankruptcy courts to determine independently the legality of any such tax."

The court below thereupon determined independently that the license fee was a contractual obligation and not a tax. It seems impossible to add anything to its opinion, and we are satisfied that this court will find no reason to change the conclusion arrived at, in determining that the claim in question was not entitled to priority.

The License Fee for 1902 Was Properly Reduced.

In investigating the amount of the claim for 1902, it was found that the state had assessed the charge upon the total capital stock of $40,000,000, instead of upon the $10,000,000 issued and outstanding. The language of the New Jersey statute is, that the corporation shall state in its return the amount of the capital stock issued and outstanding on the first day of January and shall pay an annual license fee or franchise tax of 1/10 of one per centum on all amounts of capital stock *issued and outstanding.* The corporation is not required to pay in any event upon capital stock not issued and outstanding. The corporation is required to make a return, but in the event of failure to do so, the Board of Assessors is empowered to ascertain and fix the amount of the license fee in such manner as may be deemed by them most practicable. The bankrupt corporation

failed to make any return for 1902, and the assessors made a return *November 7, 1902,* on the basis of $5,750, representing $40,000,000 of capital stock. By Section 64 A, of the Bankruptcy Act, the bankruptcy court is authorized to determine *the amount* and *legality* of any such tax as may be presented for payment in full. This is a condition attached to the right of the taxing body to present its claim, and when it comes before the court with its claim, it admits the right of the bankruptcy court to investigate the *legality and the amount of such claim.*

And in pursuance of such power the referee found, and it is stipulated as a fact (Rec., pp. 8 and 9), that on January 1, 1902, $10,000,000 of capital stock was issued and outstanding. Upon this amount the license fee would have been $4,250, instead of $5,750. The court therefore reduced the claim by this amount. If the claim arose out of a contract, as all of the courts below held it did, there was no error in looking to the contract for the measure of the liability. If the claim was in fact a tax, the claimant in accepting the benefit of Section 64 A must accept the qualification placed upon such benefit and must consent, in presenting the claim for payment in full, to re-examination of the *legality and amount* thereof as an independent right of the bankruptcy court. There was, therefore, no error in reducing the amount of the claim for 1902 in strict accord with the requirements of the New Jersey statutes.

In the recent case of the *Trenton Heat & Power Co.* v. *State Board of Assessors,* 63 Atl. Rep., 1005, decided by the Supreme Court of New Jersey, June 11, 1906, the question involved was the right of the

Board of Assessors to levy the license fee on a larger amount of capital stock than actually was outstanding when the license fee was assessed. The court said:

> "It is contended by the learned attorney general that because of the default to make return the imposition by the state board is in the nature of a penalty, and that the prosecutor should not be relieved by the court in this proceeding. This question, however, seems concluded in this court by previous decisions" (citing numerous cases).

In the last case, *People's Investment Co.* v. *State Board,* 66 N. J. Law, 175, Mr. Justice Garretson, speaking for the court, says:

> " 'There is nothing authorizing the levy of any franchise tax *other than that upon capital stock actually issued and outstanding,'* thus intimating that while the state board may determine what the tax shall be, *they can only fix the amount to be assessed upon the capital stock that is actually issued and outstanding.* The tax here, being concededly laid upon more stock than was issued and outstanding, is in excess of the power to tax conferred upon the state board by the statute. *They can only tax that which by law is taxable. To tax more is beyond their jurisdiction."*

To the same effect did the court hold in *Arimex Copper Co.* v. *Board of Assessors,* 69 N. J. Law, 121.

Counsel would reply that to re-examine into the amount of the license fee would be a collateral attack upon it, not permitted. But the assessors acted ministerially, not judicially. They were permitted to assess the fee only on the stock issued and outstanding. That determination was merely computation.

When the claim is filed before the district court, the legality of the assessment is reviewable, *through independent legislation,* as a condition of any allowance. It would not be tolerated that the state should allow its own claim and exclude the Federal court from reviewing the correctness of the allowance. There is no question of collateral attack involved. The allowance of $5,750 was clearly wrong and beyond the power of the assessors and the reduction was right.

The Assessment for 1902 Was Void.

Again, even if the court should hold that the claim was a tax, and that it should have been allowed priority, there is cogent reason why the claim for 1902 should in no event be accorded any preference. The license fee for that year never became a valid charge against the corporation. Appellee, by reason of his failure to pray and take a cross appeal, is precluded here, perhaps, from being relieved of the 1902 claim as a general claim, but is not precluded from showing the court that the license fee for that year *is entirely invalid,* and that even if it is obliged to stand as a general claim *it should in no event be given priority.*

It is provided by the first section of Chapter 159, Laws of 1884, of New Jersey, that the annual return to be made by the corporation shall not be later *than the first Tuesday of May in each year.* By Section 5 it is provided that the assessors shall certify and report to the comptroller of the state, *on or before the first Monday of June in each year,* a statement of the annual license fee or franchise

tax, as returned by each company ascertained by the state board and the amount of tax due thereon, and such tax *shall thereupon become due and payable*, and it shall be the duty of the state treasurer to receive the same; if the tax of any company remains unpaid *on the first day of July*, after the same becomes due, *the same shall thenceforth bear interest at the rate of one per cent each month* until paid. The state board is given the power to require information and reports from the corporation and the production of the books, and may swear and examine witnesses. By paragraph 2 of the Supplement of April 8, 1897, it is provided that the corporation *may appeal within three months from the aforesaid date of assessment*, being July 1, and unless the petition for appeal is filed within three months the same shall be considered and treated as waived.

The provisions of the statutes aforesaid, requiring the assessment to be made on or before the first Monday in June are mandatory and not directory. They are for the benefit of the corporation. If the assessment is made later, the corporation would nevertheless be obliged to pay interest from and after the first day of July, according to Section 5 of the act. And the three months for appeal provided for by the supplement of 1897 begin to run from the first day of July. Substantial rights given by law to the corporation are rendered of no avail. The power of the Board of Assessors to make a return is limited to the period ending on the first Monday in June of each year. Section 5 provides that such tax shall *thereupon* become due and payable, meaning on or before the first Monday in July. If

no such tax has been ascertained and reported by that day, then none can become due and payable thereafter. If, for instance, the Board of Assessors are permitted to make their report and levy in November, instead of July, the three months granted by the act for an appeal would long since have expired, and the right of appeal would be gone. It is evident that the time limit upon the right of the board to report the assessment was fixed for the benefit of the corporation.

Such restrictions upon the powers of taxing bodies have usually been held to be *mandatory* and not directory.

Cooley, on page 286 of his work on Taxation (2d Ed.), says:

> "They (meaning the provisions of taxation referred to) are of the highest importance, because it is only by means of the requirement of official action in an orderly manner *and at periodical times,* that he (the taxpayer) can be protected against arbitrary and capricious action. * * * So all provisions designed to give him (the taxpayer) the opportunity of a review of the assessment, whether by the assessors themselves or on an appeal from their conclusions, are explicitly in his interests. Every notice which the statute provides for to that end, whether by publication or otherwise, must be given with scrupulous observance of all its requisites."

Thus it has been held that a tax voted by supervisors at a time when no meeting is authorized for the purpose is illegal because the direction as to the time of meeting is mandatory.

Beard v. *Sup.*, 51 Miss., 542.

Again, it has been held that the provision by which the Board of Equalization is to meet at a certain time and remain in session a certain period is mandatory, and that the board cannot empower two of its members to continue longer in session, and their act, if they do so continue, is void.

Wiley v. *Stournoy,* 30 Ark., 609.

For similar rulings in tax cases, regarding the time at which a report or certificate must be made, the Illinois courts, in *Mix* v. *People,* 72 Ill., 241, and *Cogill* v. *Lang,* 50 Ill., 202, have held such stipulations as mandatory.

Thus it is said by Cooley that when the requisitions prescribed are intended for the protection of the citizen and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, the provisions are mandatory and not directory. They must be followed, or else the acts done will be invalid. The power of the officer in all such cases is limited by the measure and conditions prescribed for its exercise, and reference is made to the opinion of Mr. Justice Field in *French* v. *Edwards,* 13 Wallace, 506.

In the case at bar the record shows (p. 15) that on *November 7, 1902,* the State Board of Assessors filed with the comptroller of the treasury their schedule No. 7, calling for $5,750 as license fee for 1902, from the banqrupt. Page 13 of the record contains a certificate of the secretary of the State Board of Assessors, setting out that the board did *on the 7th day of November, 1902,* levy and report the assessment in question. It is clear that upon

said date the board had no power or authority to report or levy any assessment, that the assessment so reported was void because the mandatory provisions of the statutes were not followed. While, therefore, the court below *should not have allowed any sum* whatever for 1902 license fee, appellee is not in a position to complain of the allowance, because of his neglect to take a cross appeal. But appellee is in a position to insist that since it appears that any allowance would have been treated as void if appellee had been in the position to insist upon it, no priority should be given to the allowance for 1902, since it would represent the payment of a *void claim.* Appellant has done very well to procure the allowance of any sum *as a general claim* for 1902 in view of the illegality of the assessment thus made.

II.

Even if the license fee should be held to be a tax, it is not such a tax as is contemplated by section 64 A, to be paid in full.

Sec. 64 A, of the Bankruptcy Act of 1898, provides in full as follows:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

The language of the previous Bankruptcy Act of 1867, referring to the same subject matter, was:

> "In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full, in the following order:
>
> "1st. The fees, costs and expenses of suits in the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.
>
> "2nd. All debts due to the United States, and all taxes and assessments under the laws thereof.
>
> "3rd. *All debts due to the state in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such state.*
>
> "4th. Wages due to any operative, clerk or house servant to an amount not exceeding $50, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.
>
> "5th. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference in like manner, as if this act had not been passed; always provided that nothing contained in this act shall interfere with the assessment and collection of taxes, by the authority of the United States OR ANY STATE."

It will be noted upon a close reading of Sec. 64 A that the trustee is not ordered to pay the taxes *due any state, any* county, *any* district or *any* municipality, but the taxes due and owing by the bankrupt to the United States, *to the state,* to *the* county, etc. If the question were asked, *which* state, *which* county or *which* district is meant, the first and most apparent answer would be, *the state in which the*

bankruptcy proceedings are pending. It is there that the bankrupt usually has the bulk of his property, and it is there that enforcement of the tax claim could be most easily made by lien, seizure and sale of the property of the bankrupt. By reference to the Statute of 1867, it is seen that in that act only those taxes were ordered paid in advance of dividends which were owing to the state in which the proceedings in bankruptcy were pending. And in the 5th Section of the Act of 1867 it was provided that nothing contained therein should interfere with the assessment and collection of taxes by the authority of the United States *or any state.*

The construction of the last clause in the Act of 1867 was before the court in *In re Ambler,* Federal Cases, 271. There a claim was made by the State of Texas for taxes due from a bankrupt, who had been adjudicated in New York, *there being no assets or property of the bankrupt in the State of Texas.* It was argued that, under the 5th Section hereinbefore referred to, no interference should be permitted with the assessment and collection of the taxes *due any state,* but Judge Blatchford, of the Southern District of New York, refused to entertain the claim for priority of payment, saying:

> "To go beyond giving a preference due the state in which the proceedings are pending might open the door to other numerous claims for preference."

No other case can be found under the Act of 1867 construing this section in any different way, and it must be presumed that Congress, in enacting the Act of 1898, had in mind the previous decisions

and did not intend to limit the collection of taxes to that state only in which the bankruptcy proceedings were pending, but preferred to give a somewhat wider limit to the right of the various states to tax priority.

It is clear, however, that it was not the intention of Congress to confer that right *upon all states*, regardless of whether there was within their borders sufficient property from which such tax could be collected, and that Congress intended to grant the right of priority to such states only who, independently of bankruptcy proceedings, *could have actually collected the tax in question from property situated within the boundaries of such state.*

Again, referring to the language of Section 64 A, we call the court's attention to the fact that it is the tax *of the state* and not the taxes *of any state or of all states* that are ordered paid as priorities. In order to ascertain the meaning and intent of Congress, it is proper to consider the history of the Bankruptcy legislation of 1898, and the amendments made to the various bills presented to Congress, and to determine therefrom what limitations Congress intended to make upon the subject matter in question.

In Lewis' Edition of Sutherland's Statutory Construction, Par. 470, Vol. 2, it is said:

> "The proceedings of the legislature in reference to the passage of an act may be taken into consideration in construing the act. Thus, the reports of committees made to the legislature have been held to be proper sources of information in ascertaining the intent or meaning of the act. Amendments made, or proposed and

> defeated, may also throw light on the construction of the act, as finally passed, and may properly be taken into consideration."

Again, in *Blake* v. *Nat. Bank,* 23 Wall., 307, the journals of Congress were referred to and the court said that they were compelled to ascertain the legislative intent in that way.

The original Bankruptcy Act of 1898 reported to the Senate was known as the Torrey Bill, No. 1,035, referred to in Vol. 30 of Congressional Records, p. 609. It contained the following provision as Sec. 65 A:

> "Sec. 65 A. Debts owing to the United States, a state, county, parish, being a political corporation, district or municipality, after being proved and allowed, shall have priority only in the event and to the extent *that they constitute a lien upon the property of the estate.*"

The Senate adopted, instead of the Torrey Bill, a substitute bill, known as the Nelson Bill (Congressional Record, Vol. 30, page 799). The Nelson Bill contained the following provision:

> "Sec. 9. That the following debts shall have preference in the order named over other debts in the distribution of the estate of the bankrupt, to-wit:
>
> "First. Debts due to the servants and laborers employed by the bankrupt for labor performed or services rendered within six months prior to the filing of such petition.
>
> "Second. Taxes or revenues due to the United States.
>
> "Third. *Taxes due any state or territory or the District of Columbia.*
>
> "Fourth. *Taxes due any county, parish, town, city or village, in the order named.*"

After the adjournment of that session of Congress, the Henderson Bill was reported to the House and that bill as reported contained many of the provisions of the Torrey Bill as finally amended in the Nelson Bill and agreed to by the Senate. The Henderson Bill, after amendment, was finally adopted and passed by the House and was concurred in by the Senate. The Henderson Substitute Bill (Vol. 31, Congressional Rec., p. 1778) contained the present Section 64 A, and that was finally passed by Congress as part of the completed act.

Now, the original Torrey Bill provided that taxes owing to the state, etc., should only have priority in the event and to the extent *that they constituted a lien* upon the property of the estate. Under the usual safeguards to collect taxes, this would have secured to each state and district the collection of taxes upon property contained within its boundaries.

But the Nelson Bill, adopted by the Senate in lieu of the Torrey Bill, dealt much more liberally with the various states and municipalities and provided that taxes due *any state* or territory or the District of Columbia should have preference over other debts. This was a broad, liberal and unambiguous provision and had the final measure contained it, there would have been reason for the allowance as priorities of any tax claim, regardless of whether there was property within the jurisdiction of the state out of which the claim could have been collected.

But Congress expressly declined to pass such a broad and liberal section in the final Henderson

Bill, and narrowed the language of the section from "the state in which the PROCEEDINGS WERE PENDING" and from "ANY state," to "THE state," county, etc. It is submitted that the only reasonable construction which meets the gradual narrowing of the language of Sec. 64 A is such as gives priority *to such state only within whose borders the bankrupt had property, from which the state might have collected the tax.* Had Congress intended to favor only the state in which the proceedings were pending it would have used the language of the Act of 1867. Had it intended to grant the boon of priority to ALL states, regardless of other conditions, it would have used the explicit language of the Nelson Bill, which provided for priority to ANY state. By refusing to use such language, only one conclusion can be arrived at, that Congress intended to give a preference to the state, *which without bankruptcy proceedings could have collected the tax in question from property within its jurisdiction.* This construction accords with the history of the legislation and grants equality to the various states or taxing bodies who might claim under Section 64.

It would have been easy to have given priority to the taxes of any state by inserting the word *"any"* before the word "state" in the act. It is significant that Congress refused to do this, thus declining to give the broad right of preference to the tax claims of *all* or *any* states.

It is easy to suppose a case where a bankrupt, a large manufacturing corporation, has its property distributed in many states. The proceedings are pending, let us say, in the State of New York. Va-

rious claims for taxes are filed as preferences, some of the claims being made by states in which the bankrupt had no property, others being made by states in which large amounts of property were situated. *If no bankruptcy proceedings had intervened, the state in which no property was situated could not have enforced its claim in any other manner than as an ordinary creditor.* If the bankrupt were an individual, and the tax in question had been an occupation tax or a license fee, the taxing body would have had no different method of enforcing the tax than any other creditor. If property of the bankrupt were within the state or taxing body, the usual remedies, if such were given, by way of lien and sale, would have availed to collect the tax from the property within the borders of the state or taxing body. But upon bankruptcy intervening there would be no sound reason for changing the status of any state with regard to its ability to collect its own tax claims. Why, for instance, should the state wherein there was no property from which the tax could have been collected *if no bankruptcy had intervened, be given a more favorable position to collect its claim in full, upon bankruptcy?*

It is easy to imagine another case, where all of the bankrupt's property, located, let us say, in Illinois, where the proceedings are pending, sold for a smaller sum than required to satisfy the tax claims of several states, some of which would not have been collectible from property within their borders, because all of the property of the bankrupt was located in Illinois. The result of counsel's construction of Sec. 64 A would be to deprive the State of Illinois, within which the property was situated, of

the right to collect it in full, because other states that had claims which could not have been collected from property in their jurisdiction without bankruptcy proceedings, had come in to claim a share of the funds which should have been paid to the State of Illinois, a state that could have enforced the payment. Our construction is neither strained nor forced, and accords with the meaning given by the history of the legislation, and it furnishes a safe and reasonable rule for the allowance of taxes as priorities. The reason for granting preference to the claims of the state, county, district, etc., in the event of bankruptcy, seems to be that they should not be deprived through bankruptcy proceedings of the preference which they could have enforced if bankruptcy had not arisen. But where no such preference could have been enforced because no property was present in the state from which the tax could have been made, all reason for granting such priority is gone.

The effect of the construction contended for by appellant would be to grant, on account of bankruptcy proceedings, a special privilege, *which perhaps never existed without such proceedings,* and such a construction surely will not be permitted.

Applying the construction in question to the facts in this case, we find from the stipulation of facts (Rec., pp. 8 and 9) that the bankrupt had no property within the State of New Jersey at the time these various license fees were assessed. Nothing in the New Jersey statutes creates *any lien* by reason of such license fee, but Section 6 of the Act of 1884 expressly says, that such tax when determined

shall be a debt due from such company to the state, for which an action at law may be maintained after the same shall have been in arrears for a period of one month. The only method given to the state by the statutes to enforce payment of the license fee is by ordinary suit and judgment.

It appears from the proof of claim filed that the state had availed itself by the remedy of injunction and that the corporation was prevented from using its franchise. But the state could not subject the property of the corporation to any lien without a judgment at law upon its claim, and the lien created within four months of the filing of a petition in bankruptcy would have been void as a preference, the same as the judgment lien of any other creditor. All of the property and assets of the corporation were located in Illinois. The State of New Jersey could have done nothing to diminish the assets excepting to file an action at law. If the state had done that, all other creditors would have had an equal opportunity to have participated in a division of the assets. The state now attempts to absorb almost the entire fund in the hands of the trustee, leaving creditors of more than $200,000 absolutely unpaid. This is attempted by reading into the construction of Sec. 64 a requirement that the trustee pay the taxes due to ANY STATE, when it is plain that Congress intended only to pay the taxes due to THE STATE which could have collected the same from property within its borders at the time of the bankruptcy. We submit that such a result would be highly inequitable and unjust, and if such a construction is contended for by appellant, it is not warranted by anything in Sec. 64 A, but on the con-

trary the construction which we have pointed out is consistent and harmonious with the history and purpose of the bankruptcy legislation.

III.

On Certiorari.

The claim for 1903 should be disallowed, because such claim was not in existence and did not constitute a debt or tax at the time the bankruptcy petition was filed.

Appellee complained of the action of the Circuit Court of Appeals for the Seventh Circuit in ordering the 1903 license fee to be allowed and paid as a general claim. It was submitted that no such allowance could properly be made on either theory, treating the license fee as in the nature of a contract obligation or treating it as a tax.

By the statutes of New Jersey in question, the corporation was required to make its return to the State Board of Assessors on or before the first Tuesday of May. In this return the amount of the capital stock issued and outstanding on the first day of January preceding was stated. The statutes further provide that the license fee became due and payable on June 1st of each year.

It is there provided that the tax, *when determined*, shall become a debt due from the corporation to the state.

The record shows that the 1903 license fee was not determined *until June 1st, 1903* (Rec., p. 15), when the certificate of the assessors was filed with the comptroller. *Therefore the debt arose and came into being on the first day of June. Prior to that*

day nothing existed upon which the state could make a claim. Had the corporation been dissolved at any time between January 1st and June 1st, there would have been no charge in existence in favor of the state for such license fee. It is plain that, although the duties of the assessors may have been merely ministerial, they had to perform certain definite acts *before any obligation* arose from the corporation to the state.

The petition in bankruptcy was filed April 23, 1903. The date of filing the petition is the date of cleavage between those debts or obligations which can be proven and paid out of the corporate assets and those which become payable *out of subsequently acquired assets and which are not dischargeable.* Thus the obligation of the ordinary bankrupt created or coming into existence after the day of the filing of the petition is not a dischargable debt and cannot be proven or allowed in the bankruptcy proceedings. And it has been held, *In re Jefferson,* 2 A. B. R., 206, that subsequently accruing installments of rent falling due after the filing of the petition in bankruptcy cannot be proved, because they are not discharged. To the same effect did the court hold in *In re Mahler,* 5 A. B. R., 453; *Atkins* v. *Wilcox,* 5 A. B. R., 313, and *In re Ells,* 3 A. B. R., 167.

Section 63 A of the Bankruptcy Act provides that a debt to be proved must be *a fixed liability absolutely owing at the time of the filing of the petition* against the bankrupt. In the forms provided by this court for proofs of claim in bankruptcy, Nos. 31 to 36 inclusive, the language is:

> "That the person by or against whom a petition for adjudication of bankruptcy has been

filed *was at and before the filing of said petition* and still is justly and truly indebted, etc."

Section 64 A provides that the court further order the trustee to pay all taxes *legally due and owing* by the bankrupt, etc.

The state of New Jersey came into the bankruptcy proceedings as an ordinary unsecured creditor, and filed a proof of claim (Rec., p. 12), in which it set up that the bankrupt was justly and truly *indebted* to it for franchise taxes, etc. Subsequently it made a motion in the bankruptcy proceedings (Rec., p. 21), *referring especially to its proof of claim filed*, for an order allowing it priority. Again in its petition for appeal (Rec., p. 26) it recites that it is *a creditor* of the bankrupt. By everything done by appellant it was assumed that it was calling for the payment of a *debt* and demanding that the debt be given a preference.

Basing the argument on the language of Section 63, which appellant refers to in its brief on this point, we find that there *is an express limitation*, as appellant admits, *that the debt shall be owing at the time of the filing of the petition.* Referring to the forms of proofs of claim suggested by this court, we again find that it must be actually in existence on the day the bankruptcy petition is filed. It cannot be said that any debt is in existence until by the language of the statute it arises and is created, and that cannot be, and in the case at bar was not, before June 1.

The exact question here presented was decided in *In re Aultman, Miller & Co.*, 12 A. B. R., 12, where it was sought to prove a license fee due to the state

of Ohio for the year 1903. The petition was filed on *April 6, 1903*, and the fee did not become a debt *until May*. The referee denied the claim and the district court affirmed his ruling. The court said:

> "The tax is one imposed upon a corporation, not on account of its property, but on account of its right to exist and to do business as a person under the provision of the laws of the state of Ohio. Whether the corporation exists or not after the petition in bankruptcy is filed, is not a question for discussion here. If the corporation is in existence then, under the act in question, it is subject to the franchise tax, and, like an individual who has gone into bankruptcy, would be subject to after incurred indebtedness and cannot have the same imposed upon its trustee in bankruptcy. If this claim of the state of Ohio be allowed for the franchise tax of May, 1903, which could not have become a charge for more than a month after the filing of the petition, then with equal force a charge could be made for the franchise tax which would have accrued in May, 1904, and so on for every succeeding year until by some legal process the corporation has been dissolved. This *reductio ad absurdum* demonstrates pretty well the impracticability of allowing a claim like this in bankruptcy proceedings. The trustee in bankruptcy may pay taxes to the state on property in his custody, but when he disposes of the property he may close the estate without being subject to any other charges on account of the property, but how is he to rid himself of this franchise tax or right of the corporation to do business as a person under the laws of the state of Ohio? This franchise does not become an asset in the hands of the trustee, and he should not be taxed on account of it. The franchise tax law does not fix any time when the same becomes a charge upon the corporation, other than that upon the filing of the report in writing to

> the secretary of state. During the month of May the secretary of state shall charge and collect from such corporation a fee of 1/10 of one per cent upon the subscribed and outstanding capital stock of the corporation, etc.
>
> "According to that a corporation cannot be delinquent nor can the charge be made against it until the end of the 31st day of May. Under the law it is evident that there was no franchise tax owing by the bankrupt to the state of Ohio at the time of the filing of the petition in this case. Such being the case, no order can be made on the trustee to pay such tax."

The same court held this to be the rule in the case of *Emmerman* v. *Ohio Steel and Iron Co.*, 13 A. B. R., 40.

The case at bar, however, is even stronger than the Ohio case, because there was not in Ohio a precise date fixed for the creation of the debt, *while in New Jersey the absolute date of June 1st is fixed by the Statutes.*

But if we regard only the language of Section 64 A, without considering 63 or the forms of proof of debt required to be used, we cannot escape the conclusion that a tax to be paid through the bankruptcy court must actually be due and owing when the petition is filed. The section in question especially limits the payment in full to such taxes which are legally due and owing. Those words must mean something. Adopting appellants' contention, however, they mean nothing. Under the theory that counsel urge, no estate in bankruptcy could ever be closed as long as any money remained which had not been applied to the payment of taxes, because since the taxes as they accrue year by year are a valid

and preferred charge against the assets in the hands of the trustee, and are not dischargeable, as counsel contends, there never would be a time when the trustee could free himself or free the estate from this burden. This state of affairs was clearly pointed out by Judge McPherson in *In re Danville Rolling Mills Co.*, 10 A. B. R., 327. In that case, as heretofore stated, appellant was attempting to procure payment in full of the license fee, and to avoid the effect of the *U. S. Car Co.* case set up an ingenuous theory to the effect that the claim for license fee was a provable debt under Section 63, Clause 4, which includes debts founded upon a contract express or implied. The state argued that when the corporation was created a continuing contract was immediately implied to pay whatever sum the state might legally require of it thereafter; that the implied contract made the corporation always contingently liable for all future taxes and charges; that the ascertainment of the license fee for 1901 was a mere liquidation of a liability that had existed from the birth of the corporation, and that therefore the obligation to pay existed when the petition was filed, although the precise sum to be paid had not yet been ascertained. That is the same theory that appellant adopts here to avoid the clear provisions of the bankruptcy law, but Judge McPherson refused to entertain seriously this contention, and said:

> "This argument is ingenuous, but I do not regard it as sound. In my opinion, Clause 4 of Section 63 does not refer to any such implied contract as, for the purposes of this case, may be conceded to exist between the corporation

and the state. As I read the statute, the subject of 'Taxes,' whatever may be the scope of the word, is dealt with by the Bankrupt Act in Clause (a) of Section 64, and is not referred to at all in Clause 4 of the preceding section. Certainly, the ordinary meaning of the phrase, 'a contract, express or implied,' does not include the public duties that a corporate creature owes to its sovereign creator. If it includes the duty to pay lawful annual charges, it also includes the duty to obey all other laws; and since 'debt' in the Bankruptcy Act means 'any debt, demand or claim provable in bankruptcy,' it would follow logically that any money claim of the state against a corporation, arising out of a violation of law, would be also provable. It seems to me impossible to stretch the language of this clause so far as to include the subject now under consideration."

Counsel have used this same case to illustrate a previous point, that the license fee could not be founded upon a contract, on page 35 of their brief. The inconsistent position of appellant is nowhere better illustrated than by the fact that it uses the language of Judge McPherson in this behalf to prove that the license fee is not a contractual obligation, *while appellant was arguing before that court that it was a contractual obligation.* The fallacy of appellant's argument was clearly exposed by the learned judge.

There is no difference in claiming a franchise tax for 1903 in the case at bar and in claiming a franchise tax for 1904 or 1905.

To affirm the judgment of the Circuit Court of Appeals allowing the 1903 license fee in any amount would be in effect to hold that there is *no time limit* during which the taxing body can claim priority

against a bankrupt estate, but that as long as there are any funds on hand, each subsequent year's charge may be claimed as a preference. This again destroys the meaning of the explicit language of Section 64 A, and introduces by implication into that section the words, "at any time up to the closing of the estate or while funds are in the hands of the trustee," making the section read, "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt at any time up to the closing of the estate or while funds are in the hands of the trustee." As estates are very often administered for a period of two or three years or even longer, it would result that each subsequent assessment would be given priority and that such claims could be preferred simply by reason of the bankrupt estate being kept open. Such a result was certainly never intended by congress.

And if counsel for appellant believed in this position, why was no claim for 1904 and 1905 license fees filed in the bankrupt estate?

Appellant argues that Section 63 has no reference to taxes and that all tax claims must be solved by virtue of Section 64;—and that as Section 64 contains no limitation as to time, it is immaterial when the tax claim accrues.

Appellant also lays stress upon the fact that tax claims are not dischargeable. That, however, does not furnish any comfort to counsel. *If a tax claim is not dischargeable, it becomes a claim against subsequently acquired property of the bankrupt.* That is the precise theory of the cases cited by us, including *Re Jefferson*, 2 A. B. R., 206; *Re Mahler*,

5 A. B. R., 453; *Atkins* v. *Wilcox*, 5 A. B. R., 13; and *In re Ells*, 3 A. B. R., 565. That a debt is not dischargeable does not mean that it shall be payable out of the assets in the hands of the trustee, like any dischargeable obligation. If it is non-dischargeable, because it accrues subsequent to the filing of the petition, as is claimed by appellant for the license fee of 1903, then there is every reason for not paying it out of the assets in the hands of the trustee, because such a claimant can look to subsequently acquired assets, whereas the general creditors of the bankrupt estate cannot. We submit that the reasoning of the *Aultman Miller & Co.* case, and the *Emmerman* case, *supra*, is persuasive and should be conclusive of this question.

We are unable to see how the use of *Re U. S. Car Co.*, 60 N. J. Eq., 514, can shed any light upon the question at issue. That case was determined under the peculiar language of the New Jersey statute, relating to a New Jersey insolvency case. We have pointed out that the case held that the license fee *was not a tax* and that it should be paid by receivers, in preference to the claims of general creditors, because of the provision of the New Jersey statute making it a preferred debt in the event of insolvency. How this case leads to the conclusion of counsel that taxes are expressly made a preferred claim against the trustee, even though they are not assessed until after the petition in bankruptcy is filed, is beyond our ability to comprehend, but the conclusion of the argument certainly discloses an absurdity. Because a discharge in bankruptcy would not bar the claim of the state against a corporation, since the corporation is liable

until its charter is surrendered to the state, counsel would argue that the license fee of 1903 should be allowed as a claim against the trustee. It is argued that the corporation continues to live after bankruptcy, and that the claim for alleged taxes is not discharged. That being true the corporation can continue to amass property and the claim of the state for alleged taxes will be good as against such subsequently acquired property, while all previously held property will be applicable to the claims of previous creditors.

In the case of an individual the date of filing the petition marks a new period of his financial career. On that day he turns over all his property and rights of property to his then existing creditors. All claims which arise *thereafter* are paid out of such property which he may acquire *thereafter* and the date of cleavage is the day of the filing of the petition. There is no difference between the case of the corporation and that of an individual. The language of Section 64 A plainly shows that congress intended to afford preference only to such tax claims *as were legally due and owing when the petition was filed.* To so hold would be in harmony with the whole purpose and intent of the Bankruptcy Act. To treat a tax claim which arose long after the filing of the petition as entitled to priority would be to introduce confusion into the clearly intended method of administration. And if the claim presented is not a tax, but arises out of contract, then if it is not in existence when the petition is filed, it certainly cannot be allowed at all. This is not similar to the case of a note or debt *absolutely existing, but not payable,* when the petition is filed. The Bank-

ruptcy Act specifically looks after such cases (Section 63). It would overturn the effect of the past decisions in bankruptcy to hold that a claim could be given life as a valid claim against an estate, because it came into being at a time when the estate was still open.

We submit that the Circuit Court of Appeals erred in allowing any claim for 1903, and that that much of its decree should be reversed and the remainder affirmed.

Conclusion.

If the claim of the State of New Jersey for 1902 had been a valid claim and were clearly a tax, collectible from property in the state, there might have been some justification for appellant's contentions, but it has been shown that it never was a valid claim, because the action of the assessors was a nullity, and that even if it were a valid claim, it was not a tax, but had been held by the highest court of New Jersey to be not a tax in the latest and most deliberate opinion upon the question. The claim for 1903 has been shown to have had no existence on the day that the bankruptcy petition was filed, and to be not entitled to allowance for any amount, either on the theory of a contract obligation or on the theory of a tax. But more than all this it has been demonstrated, we believe, to the satisfaction of the court, that the proper construction of Section 64 does not give any preference to the claim of a state for taxes, unless, within the borders of such state, there was property of the bankrupt at the time the petition was filed, to pay the taxes. If the claim of appellant should be allowed as a

priority, violence would be done not alone to the explicit language of the Bankruptcy Act and to the clear intent of Congress, but to the solemn decisions of the courts of New Jersey. But the general creditors of the bankrupt would be left in a sad plight where the bulk of the estate is paid out upon a license fee that never could have been collected by the state in any other manner than the general creditors could have collected their claims—that is, by suit and judgment. Had the State of New Jersey obtained a judgment lien against the property of the bankrupt in Illinois, where it was all located, it may well be assumed that within four months of the time that such lien accrued the general creditors would have shared in such lien by means of bankruptcy proceedings. In such a case the state would have exhausted the only remedy given to it for the actual collection of the license fee and would have been able to do no more than to share *pari passu* with the general creditors of the bankrupt. That is all that the state is entitled to do now, and we submit that from every consideration of equity and right and to carry out the spirit and intent of the Bankruptcy Act, the judgment below should be affirmed excepting in the respect we have indicated, and in that particular it should be reversed.

Respectfully submitted.

HORACE KENT TENNEY,
FREDERICK D. SILBER,
Counsel for Appellee.